88-369 (1)

Supreme Court, U.S.
FILED
AUG 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DRAKE PUBLISHERS, INC. d/b/a HIGH SOCIETY MAGAZINE,
Petitioners,

v.

JABER A. SAMAD AND S & H MANAGEMENT CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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cation of this test to a work of fiction, is consistent with the First Amendment and the mandate of this Court in *New York Times* and its progeny, where that conclusion is founded upon

a) disbelief of the publisher's testimony that it was unaware of the existence of the Plaintiff, or its Restaurant, the *Waterfront Cafe*, locally known as the *Carousel*; and

b) the failure of the publisher to obtain from the freelance writer of the fictional story (a writer well-known to the publisher) an executed purchase order form providing assurances that the story would not infringe on any "rights" of any individual or entity.

3) Whether the District Court's conclusion that "Savage Lust" was "of and concerning" S & H, based on "similarities" between fact and fiction, violated the First Amendment and this Court's teachings in *New York Times v. Sullivan* and *Rosenblatt v. Baer*, and whether this Court has independent appellate review on the of and concerning issue.

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JABER A. SAMAD AND S & H MANAGEMENT CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, DRAKE PUBLISHERS, INC., hereby asks this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered on April 29, 1988.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit was issued on April 29, 1988. [App. A] [1] Petitioner's request for rehearing *en banc* was denied without opinion on May 31, 1988. [App. C].

The Memorandum Opinion of the District Court was issued on March 2, 1987. [App. B at 3a-18a]. The order denying Drake's Motion for j.n.o.v. or additional findings of fact was issued on July 2, 1987. [*Id.* at 19a-22a]. Judgment by the District Court was entered on July 24,

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[1] References to the Appendices herein are denominated "[App. —— at ——]."

1987 [*Id.* at 23a], after which both Plaintiffs and Drake timely appealed to the Third Circuit.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1988, and a timely petition for rehearing *en banc* was thereafter denied on May 31, 1988. This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The District Court of the Virgin Islands had general original jurisdiction pursuant to 4 V.I.C. § 32 and 48 U.S.C. § 1612. (This action was commenced prior to the amendment to 48 U.S.C. § 1612 which granted diversity jurisdiction to the District Court of the Virgin Islands.) Jurisdiction of the appeal vested in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES

FIRST AMENDMENT

Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

TITLE 48 U.S. CODE § 1561 (1987)

The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the first to ninth amendments inclusive; . . . .

TITLE 1 VIRGIN ISLANDS CODE § 4 (1987)

§ 4. Application of common law; restatements

The rules of the common law, as expressed in the restatements of the law approved by the American Law

Institu,e, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

RESTATEMENT (SECOND) OF TORTS § 564 (1987)

§ 564. Applicability of Defamatory Communication to Plaintiff

A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.

Comment *d*.

Fictitious character. A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person. If the work is reasonably understood as portraying an actual person, it is not decisive that the author or playwright did not so intend. (See Comment *f*). The fact that the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand otherwise. Such a statement, however, is a factor to be considered by the jury in determining whether readers did so understand it, or, if so, whether the understanding was reasonable.

THIRD CIRCUIT INTERNAL OPERATING PROCEDURES 28 U.S.C.A., U.S. COURT OF APPEALS, THIRD CIRCUIT RULES, APP. I, INTERNATIONAL OPERATING PROCEDURES (1986)

A. Criteria.

A case may be terminated in this Court by a judgment order:

1. Panel unanimity.
   a. When the panel unanimously determines that a judgment of the district court . . . should be affirmed or enforced and that a written opinion would have no precedential or institutional value; and
   b. any one or more of the following circumstances is dispositive of a matter submitted for decision:
      (1) That a judgment of the district court is based on findings of fact which are not clearly erroneous;

      * * * *

      (4) That no error of law appears; . . . .

STATEMENT OF THE CASE

A. Procedural History

In 1982, plaintiffs Jaber A. Samad ("Samad") and S & H Management Corp. ("S & H") instituted a Ten Million Dollar ($10,000,000 defamation action against High Society Magazine ("High Society") and Russell Smith ("Smith") in the District Court of the Virgin Islands.[2] The alleged defamatory publication was a two-page work of erotic fiction entitled "Savage Lust," which appeared in the December 1981 issue of High Society.[3]

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[2] Although the parties are in fact diverse, jurisdiction was predicated on the general original jurisdiction of the District Court of the Virgin Islands.

[3] Russell Smith authored "Savage Lust". Smith was severed from the action on August 12. 1985 on stipulation of the parties. [See App. A at 4a].

[App. E at 38a-47a]. The plaintiffs claimed that the story was of and concerning them; the defendants denied this and contended that they were without fault in the publication. Drake Publishers, Inc. ("Drake") was substituted as the successor in interest to High Society Magazine.

Following a two-day bench trial held on August 12-13, 1985,[4] the Court took the matter under advisement for almost eighteen months. On March 2, 1987, by memorandum opinion [App. B at 3a-18a], the Court found that the story was "of and concerning" S & H, but not Samad. [*Id.* at 11a]. The Court further found actual malice by Drake in the publication of "Savage Lust" by finding actual knowledge or alternatively reckless disregard. [*Id.* at 14a]. Although no proof of actual damages had been presented, the District Court awarded S & H Seventy-Five Thousand Dollars ($75,000) in "presumed damages". [*Id.* at 18a]. The action by Samad was dismissed with prejudice.

Drake moved for j.n.o.v. or alternatively for additional findings of fact on the actual malice issue [App. D at 26a-32a], and Samad moved for reconsideration. By separate orders, the District Court denied both of said motions. [App. B at 19a-22a]. On July 24, 1987, the District Court entered a Rule 58 judgment in this matter [*Id.* at 23a]. No post judgment motions were filed and both sides timely appealed.

In its main and reply briefs, Drake challenged *inter alia* the District Court's conclusion that "actual malice" had been proven by clear and convincing evidence, as

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[4] At the conclusion of the live testimony, the District Court declined to hear the preserved deposition testimony of the numerous witnesses for both sides, or any further matters, including closing arguments. Instead, the Court asked for written submissions containing those portions of the deposition testimony relied on by each side, as well as closing arguments. Drake submitted a Motion for Directed Verdict as a part of its written submission.

well as its finding that the fictional story was "of and concerning" S & H.

The United States Court of Appeals for the Third Circuit on April 29, 1988, summarily affirmed in all respects the judgment of the District Court in a one sentence Judgment Order.[5] [App. A]. Drake's timely request for rehearing *en banc* was denied on May 31, 1988. [App. C].

B. Record Facts

Although the two-page story "Savage Lust" speaks for itself, and is available in the Appendix for this Court's independent review, a brief summary of the points salient to this appeal are herein set forth.

"Savage Lust" is subtitled "Erotic fiction by Russell Smith." The prelude following the title announces in part that "Jackson took off with the money for the Virgin Islands to find a new identity, a new life." [App. E at 37a].

There are two main characters: Jackson Conrad ("Conrad"), owner of the *Carousel Bar*, and Margo Boland ("Boland"). The majority of the story is set in various locations in and about St. Thomas, U.S. Virgin Islands. In essence, the story is about a man, a woman, and a secret they share. It is told in explicit, provocative terms, and contains, in the author's words, a "double O'Henry" ending [App. J at 97a].

Plaintiffs contended that the descriptions of the main characters, the *Carousel* and the illustration preceding the story were of and concerning Samad and S & H, his wholly owned corporation which operated the *Waterfront Cafe*, locally known as the *Carousel Restaurant*. [App. B at 4a-7a]. The evidence at trial and pursuant to Rule 36 admissions, however, established the following substantial differences and critical facts:

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[5] The Court of Appeals' judgment order was issued ten (10) days after oral argument.

1) Although "Savage Lust" describes Conrad as purchasing the *Carousel* for cash [App. E at 41a], S & H purchased the restaurant with a Ten Thousand Dollar ($10,000) loan from Barclays Bank, a loan from one of Samad's brothers, and owner financing. [*See* App. K at 102a; and App. I at 86a].

2) The fictional *Carousel* was located in an isolated barrio in the Frenchtown section of St. Thomas [App. E at 40a], whereas S & H's *Waterfront Cafe* was located on Waterfront Drive in the downtown section of busy Charlotte Amalie, the Territory's capital. [App. K at 102a].

3) In contrast to the bar in the story [App. E at 40a], the *Waterfront Cafe* a/k/a/ the *Carousel Restaurant*, did not have a mandolin player [App. K at 102a], did not serve chicken drenched in catsup (App. I at 90a-91a], was not a "symbol of tropical decadence" (App. K at 102a], was not populated by "half-naked Martinique whores" [*Id.*], and did not attract tourists because of its derelict clientele or cheap or gaudy atmosphere. [*Id.*].

4) Both the "Greenhouse," a bar and restaurant which neighbored S & H's establishment, and the "Clarosel," a bar located in a depressed, run-down area of the island, were popular with prostitutes.[6]

5) The buxom woman in the illustration preceding "Savage Lust" [App. E at 37a] is depicted as a redhead [App. H at 78a], although the female character in the story is a blond. [App. E at 41a].

6) The illustration preceding the story pictured two palm-covered tropical islands and a cruise ship. [App. E at 37a].

7) The trade name *Carousel* was owned by Hagan House, Inc., John Tallman ("Tallman"), president from 1963 until 1982. [App. I at 92a]. S & H purchased the assets and the sublease of the restau-

[6] The "Greenhouse" was known for Puerto Rican prostitutes, while the "Clarosel" was frequented by Martinique prostitutes. [*See* App. B at 12a, and App. I at 89a].

rant from Hagan House, Inc., in 1980 but it did not purchase the trade name Carousel. S & H operated the restaurant under the trade name *Waterfront Cafe*, which it owned and in which name it had its business license. [App. B at 4a]. In 1982 S & H sold its business and lease to one William Slough, who also purchased the trade name *Carousel* from the Hagan House.

Gloria Leonard ("Leonard"), the publisher of High Society, lived in Puerto Rico from 1968-1970. [App. F at 49a]. During that time, which the court characterized as the *Carousel's* heyday" [App. B at 7a], Leonard visited St. Thomas on "a number of occasions." [App. F at 49a]. Since 1970, Leonard had visited St. Thomas five to seven times (including the two most recent trips to St. Thomas in June and August 1985 in connection with the trial of this matter.) [*Id.* at 50a].

At trial, Leonard was able to name certain stores, including Lion in the Sun, The Riviera Boutique and Sparky's liquor store. [*Id.*]. However, with respect to the *Carousel*, Ms. Leonard testified as follows:

Q. Do you recall seeing the Carousel Bar?

A. Never.

Q. You never remember seeing the sign?

A. Never saw it, never heard of it.

[App. F at 50a].

Leonard admitted that Drake did not investigate or "vet" the "facts" of the story prior to publication. In part this was because fiction cannot be vetted "because there are no facts." [*Id.* at 56a-57a]. The impracticalities of vetting fiction take on added weight in light of the fact that Drake chooses approximately one story out of one hundred for publication every month, and these stories often are set in such far-flung locations as Saigon, Rome, Milan, Australia, Rio and others. [*Id.* at 58a]. Both Leonard and Ira Kirschenbaum, High Society's Vice President, testified that there are no official guidelines

for publishers which impose a duty to vet fiction. [*Id.* at 56a-57a; and App. G at 67a]. High Society's expert witness, Lawrence Levine, corroborated this and identified some of the impracticalities of attempting to vet fiction. [App. H at 74a-76a].

"Nothing whatsoever" within the four corners of this particular story alerted Ms. Leonard to there being anything defamatory about it, or that it referred or was intended to refer to any real person. [App. F at 56a]. Indeed, at the time of the trial, Leonard testified that she continued in her belief that the story was not about the plaintiff or anyone else. [*Id.* at 58a]. Tallman, the *Carousel's* former owner of nearly twenty years concurred. Smith was well-known to Drake and had a proven track record as an author of erotic fiction. [App. F at 51a]. Smith had submitted the story in response to a request for a piece of fiction "very hot," and Drake had published it in reliance on Smith. [Id. at 51a, and 52a]. Drake further relied on the subtitle to the story as well as the disclaimer on p.4 of the magazine which alerted readers that "Savage Lust" was "erotic fiction" and that any similarity between fictional and real places and persons was "purely coincidental." [App. E at 36a. *See also* App. F at 69a].

By deposition admitted into evidence, Kirschenbaum testified that to the best of his knowledge, the illustration preceding the story was drawn by a freelancer who had not been given "Savage Lust" to read. [*Id.* at 64a-65a]. Smith similarly testified that he did not have anything to do with the illustration and that after he submitted "Savage Lust" for publication, he had no further contact with the story. [App. J at 98a-100a].

Drake's position was that the similarities, if any, between the illustration on the one hand, and the story and/or reality on the other, were purely coincidental. S & H introduced no evidence on this point.

Tallman also testified for the defense. In a great number of details, his life was remarkably similar to the

fictional Conrad including prior bar experience, foreign incarcerations, dress and privacy of abode. [App. I at 83a-86a and 91a-92a]. Nonetheless, he took on face value the story's denomination as fiction, and he did not believe "Savage Lust" was about either himself or the plaintiffs, or for that matter, the *Clarosel Bar.* [*Id.* at 91a].

The District Court concluded that the illustration was intended to depict Boland and thus Samad's girlfriend, who worked at S & H's bar, and was described as buxom and blond, although she never testified and no photograph of her was ever produced. [App. B at 11a-12a]. In addition, the Court also concluded the illustration was similar to the scene one would observe from the Waterfront area of S & H's *Waterfront Cafe* [App. B at 12a]. The proximity of the "Greenhouse" to the real *Carousel Restaurant,* plus the popularity of same with tourists and sailors, led the District Court to find that the story was of and concerning the *Carousel Restaurant* and hence S & H. [App. B at 11a-12a].

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES COMPELLING QUESTIONS IMPLICATING THE FIRST AMENDMENT WITH RESPECT TO THE THIRD CIRCUIT'S FAILURE TO ARTICULATE AN INDEPENDENT EXAMINATION OF THE WHOLE RECORD IN AFFIRMING THE DISTRICT COURT'S FINDING OF ACTUAL MALICE AND WHETHER SAID FAILURE CONFLICTS WITH THIS COURT'S DECISION IN *BOSE V. CONSUMERS UNION* OR CONSTITUTES SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

In defamation cases where there is a finding of actual malice, the appellate courts have an affirmative constitutional obligation under the First Amendment to make an independent examination of the whole record to determine if "actual malice" has been proven by clear and

convincing evidence. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 (1984); *New York Times v. Sullivan*, 376 U.S. 254, 258 (1964). The requirement of independent appellate review is a rule of federal constitutional law. *Bose*, 466 U.S. at 510.

To comply with the mandate of *Bose*, the Courts of Appeals universally have articulated their independent appellate review by way of written opinions which provide the bases for their conclusions and holdings.[7]

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[7] In opinion after opinion, the various circuit courts have consistently explained their review of the evidence as a whole and have articulated their determination as to whether the record proof of actual malice is clear and convincing. For example, in *Brasslett v. Cota*, 761 F.2d 827, 841 (1st Cir. 1987), the First Circuit extensively examined the facts and stated, "We believe that *Bose* clearly requires us to undertake an independent review of the District Court's ultimate finding that Brasslett's statements to the press were unprotected under the First Amendment." In *McKinley v. Baden*, 777 F.2d 1017, 1022 (5th Cir. 1985), the Fifth Circuit considered the implications of the District Court's finding of actual malice and declared: "After our independent review of the record, however, it is our judgment that the record fails to establish malice with "convincing clarity." The Fifth Circuit has further held that it is constitutionally required to "substitute" its judgment for that of the jury's in "conducting an independent review of the record both to be sure the speech in question actually falls within the unprotected category, and to confine the perimeters of any unprotected category within acceptable narrow limits in an effort to ensure that protected expression will not be limited." *Herceq v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1219 (1988). The Sixth Circuit, in *Connaughton v. Hanks Communications, Inc.*, 842 F.2d 825 (1988), extensively probed the jury's findings of fact, and then, to implement the *Bose* mandate, conducted an additional independent review of the entire record to correct errors of law, "including those that may have infected so-called mixed findings of law and fact, or findings of fact that are predicated on a misunderstanding of a governing rule of law, if any existed. . . ." In *Tavoulareas v. Piro*, 817 F.2d 762, 788 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 200 (1988), the D.C. Circuit, after a lengthy and extremely detailed review

It is fair to say that the issuance of memoranda opinions which articulate the views of the Circuit Courts in reviewing lower courts' actual malice determinations is both called for by *Bose* and is the accepted and usual course of appellate proceedings in such cases.

The Third Circuit strayed from the accepted and usual course of proceedings by disposing of the appeal of this matter with a one-sentence judgment order.

Under the Third Circuit's Internal Operating Procedures ("IOP"), Ch.VI.A.1.b., judgment orders are permitted only under the following "circumstances" relevant to this case: the decision below is not clearly erroneous or no error of law appears.[8] 28 U.S.C., Ct. of App., 3rd

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of the underlying facts, noted that "courts may not abdicate to triers of fact the responsibility for developing the contours of the actual malice rule. Instead, courts are obligated to conduct an independent examination of the whole record."

Where only a partial record was submitted on appeal, the Tenth Circuit felt constrained to state: "We have followed, to the limited extent possible, the admonition of the Supreme Court in *Bose, Inc.* [*sic*] *v. Consumers Union*, as an appellate court to examine all we have before us as the record." *Hardin v. Santa Fe Reporter, Inc.*, 745 F.2d 1323, 1326 (10th Cir. 1984).

See also Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1293 (D.C. Cir. 1988); *Zerangue v. TSP Newspaper, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *In re IBP Confidential Bus. Documents Litigation*, 797 F.2d 632, 643 (8th Cir. 1986), *reh. den., en banc*, 800 F.2d 787, *cert. denied, sub nom. Bagley v. IBP*, 107 S.Ct. 1293 (1987); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1146-47 (7th Cir. 1985).

[8] The other circumstances enunciated in subsections (2), (3), (5) and (6) are inapplicable to this case.

Drake—and this Court—are left to speculate which of the two potentially applicable standards under IOP Ch.VI.A.1.b. were employed below. Only a clear articulation of the standard employed by the Circuit Court will permit "meaningful appellate review" by this Court. *Cf. U.S. v. Taylor*, —— U.S. ——, 108 S.Ct. 2413

Cir. Rules, Appendix I, Internal Operating Procedures, Ch.VI.A.1.b(1) and (4). Neither standard of review was appropriate in this matter.

In *Bose*, this Court expressly rejected the "clearly erroneous" standard of review for First Amendment cases where actual malice has been found in the trial court. 466 U.S. at 514. Thus, a review by the Third Circuit under the criteria set forth in subsection b.(1) of that Court's Internal Operating Procedures would squarely conflict with *Bose*.

The "no error of law" standard also is deficient. In *Bose* this Court explained that actual malice findings were issues of "constitutional fact" compelling a *de novo* review. 466 U.S. at 484-85 n.27 *and citations therein.* This in part was due to the intermingling of law and fact in actual malice determinations. *Id.* In further part, such independent appellate review

> . . . reflects a deeply held conviction that judges—and particularly Members of this Court—must exer-

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(1988) (articulation by the district court required for dismissals under the Speedy Trial Act).

The Third Circuit's determination under Ch.VI.A.1.a. of its Internal Operating Procedures that a memorandum opinion would be of no precedential or institutional value also is disturbing. The Circuit Court in reviewing judgments from the District Court of the Virgin Islands acts not only as a federal Court of Appeals, but also, in effect, as the Supreme Court of the Territory inasmuch as there is no territorial appellate court system. *See e.g.* Section 23A(c) of the Revised Organic Act of 1954, as amended, prec. Title 1 V.I.C. (1987), 48 U.S.C. § 1613a(c). This case clearly raised issues of first impression both within the Territory and within the Circuit, regarding the application of the "actual malice" test and the "of and concerning" test to publishers of works of fiction. The Third Circuit's determination under these facts that the case had no precedential value is troubling, particularly in light of the substantial presumed damages awarded S & H in the absence of any evidence of compensatory damages.

> cise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."
>
> (466 U.S. at 510-11.)

The terse judgment order of the Third Circuit falls woefully short of the letter as well as the spirit of this Court's mandate in *Bose*.[9]

Moreover, since the *Bose* standard of independent appellate review was argued vigorously and repeatedly to the Third Circuit in Drake's Main and Reply briefs, and again in Drake's Petition for Rehearing *en banc* it must, under settled Third Circuit jurisprudence, be deemed to have been considered and rejected. *See Todd and Co. Inc. v. S.E.C.*, 637 F.2d 154 (3d Cir. 1980) (where arguments are raised in a petitioner's brief, and decided without discussion, the Court "must have rejected each argument." *Id.* at 156). This places the Third Circuit's decision squarely in conflict with *Bose*.

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[9] Even if the assumption were indulged in, *arguendo*, that the Third Circuit did indeed silently conduct a full *Bose* review of the record, this case still would warrant a "fuller analysis" under the appropriate standards. *See e.g. Miller v. Fenton*, 474 U.S. 104, 118 (1985) (where this Court relying in part on *Bose*, remanded to the Third Circuit for a fuller analysis, despite the Circuit Court's suggestion in a footnote that it would have reached the same result even if it had given the issue plenary consideration. On remand, the Third Circuit articulated its plenary consideration in a written opinion).

It is clear beyond cavil that the Circuit Courts may not inadequately conduct their appellate functions nor, since *Bose*, conduct their reviews of actual malice determinations under the "clearly erroneous" standard. The Third Circuit in this case has wrapped its decision-making and review process in a cloak of silence. Drake's right under the First Amendment to an independent appellate examination of the whole record cannot be so lightly or easily sidestepped by the Third Circuit. A written memorandum opinion fully articulating the Circuit's independent appellate review was necessary to comply with *Bose*.

This Court, too, has a duty to independently review the whole record on the actual malice issue. Accordingly, the Writ of Certiorari should be granted herein both to provide that review by this Court and to correct the departure of the court below from the accepted and usual course of appellate proceedings.

II. THIS CASE RAISES IMPORTANT ISSUES OF FIRST AMENDMENT LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT REGARDING THE APPLICATION OF THE ACTUAL MALICE TEST TO WORKS OF FICTION

It is settled First Amendment law that a statement is made with "actual malice" if it is made with knowledge of its falsity or with reckless disregard of whether it is false or not. *New York Times*, 376 U.S. at 279-80. A statement is made with "reckless disregard" if the Defendant "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

A finding of actual malice must be supported by "independent evidence" of knowledge or reckless disregard. *Bose Corporation v. Consumers Union*, 466 U.S. at 498. Such knowledge or recklessness must exist *at the time*

of publication. Id. at 498, 512. Otherwise stated, the subjective awareness necessary to support an actual malice determination must be "brought home" to the publisher at the time of publication. *New York Times*, 376 U.S. at 287. Proof of actual malice must be made by clear and convincing evidence. *Bose*, 466 U.S. at 511.

Both the Court of Appeals and this Court must make "an independent examination of the whole record" when reviewing a lower court determination of actual malice. *Bose*, 466 U.S. at 508, *quoting New York Times*, 376 U.S. at 285.

Never before decided by this Court is the appropriateness of the application of the actual malice test to works of fiction which, by definition, are "false" in the sense that they do not purport to speak the literal truth. Thus, literal application of the *New York Times* actual malice test to a work of fiction is constitutionally prohibited since the First Amendment does not permit liability without fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at 347-48 (1974). Under *Gertz*, the "fault" required of a publisher of fiction *must* be that, at the time of publication, he knew the story would be understood as a "specific reference" to the plaintiff, or that he was reckless or negligent in failing to anticipate this. (For convenience, this will be referred to as "specifically referenced actual malice"). However, under *Gertz*, negligence is an inappropriate standard of liability where the communication does not warn the reasonably prudent publisher of its "defamatory potential." *Id.* at 348; *see also* Restatement, *supra*, § 580B, Comment *d*; *Gazette, Inc. v. Harris*, 325 S.E. 2d 713, 725, 727 (Va.), *cert. denied*, 472 U.S. 1032 (1985).[10] The "defamatory poten-

[10] During the three years that this matter was in pretrial, and at trial, S & H took the position that Drake was under a duty to investigate to ensure that its stories did not refer to anyone real. Since Drake admittedly did not so investigate, S & H argued that Drake was negligent and therefore liable. In its mo-

tial" of a fictional work will never be apparent where, as here, (1) the author, who has a proven track record with the publisher, represents that the work is fiction, (2) the plaintiff is a private figure unknown to the publisher, and (3) the work looks and sounds like fiction. *Cf. Bindrim v. Mitchell*; *Hustler Magazine, Inc. v. Falwell*, —— U.S. ——, 108 S.Ct. 876 (1988) (where an obvious parody contained no false statement of fact, there was no defamation); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S.

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tions for summary judgment and directed verdict, and again on appeal to the Third Circuit, Drake pointed out that there was no authority for S & H's position, and that the lower courts were unanimous in holding that a publisher of fiction was under no duty to investigate whether its fictional characters resembled or were similar to real private persons. *See e.g. Clare v. Farrell*, 70 F.Supp. 276, 279 (D.Minn. 1947); *Bindrim v. Mitchell*, 155 Cal.Rptr. 29, 36 (Cal.Ct.App. 1979), *cert. denied*, 444 U.S. 984, *reh. denied*, 444 U.S. 1040 (1980); *Landau v. CBS*, 128 N.Y.S. 2d 254, 257-58 (Sup.Ct. 1954), *aff'd*, 147 N.Y.S.2d 687 (1st Dept. 1955); *Brafman v. Houghton Miflin Co.*, 11 Med.L. Rtpr. 1354, at vii (Additions and Corrections) (N.Y. Sup.Ct. 1984); *accord Smith v. Huntington Publishing Co.*, 410 F.Supp. 1270 (S.D. Ohio 1975) (an author "is under no duty to foreclose the possibility of anyone being identified with the fictional character." *Id.* at 1274), *aff'd without op.*, 535 F.2d 1255 (6th Cir. 1976); *cf. Lake Havasu Estates, Inc. v. The Reader's Digest Assoc., Inc.*, 441 F.Supp. 489 (S.D.N.Y. 1977); *see also St. Amant v. Thompson*, 731-33 (investigatory failure alone is insufficient to establish actual malice). Drake further argued below that S & H's position ran contrary to this Court's teachings in *Gertz* that negligence was an inappropriate standard of liability where, as here, the communication does not warn the publisher of its defamatory potential. *See* discussion in text, *supra*.

Since the coincidental suggestion of private persons by fictional characters is likely, if not inevitable, in the writing of fiction, and since an effective investigation to exclude all potential defamation plaintiffs is impossible in practical terms, *see e.g. Clare v. Farrell*, and *Landau v. CBS*, liability premised on a negligent or deliberate failure to investigate would be tantamount to strict liability for fiction writers and publishers. This, of course, is impermissible under the First Amendment and *Gertz*.

1127 (1985); *Saenz v. Playboy Enterprises, Inc.*, 653 F.Supp. 552 (N.D.Ill. 1987), *aff'd*, 841 F.2d 1309 (7th Cir. 1988). Accordingly, in such circumstances, the publication of fiction is not actionable unless the publisher acted with "specifically referenced actual malice." *Cf. Bindrim v. Mitchell.* Such a standard will, in combination with a strict "of and concerning" test (see discussion *infra*), safeguard against the countless situations where, due to coincidence, a fictional story may later appear to be about a private person who was unknown to the publisher at the time of publication.

In this case, Leonard testified at trial that she had never seen or heard of the *Carousel*, and that "Savage Lust" was not about the Plaintiffs or anyone else.[11] There was absolutely no independent evidence that Leonard ever was aware of the *Carousel* or, more importantly, S & H. The District Court's contrary conclusion, based simply on disbelief of Leonard's testimony ("selective memory failure"),[12] is "speculation run riot . . .

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[11] Kirschenbaum, who had visited St. Thomas on a cruise ship once, years before, for a single day, testified likewise.

[12] The District Court disbelieved Leonard about the *Carousel* because since 1970, Leonard had visited St. Thomas five to seven times (at least two of which were in 1985) and was able to recall three establishments (none of which were identified as bars or restaurants) by name, but she did not remember the *Carousel*.

The District Court, in its Memorandum Opinion issued eighteen months after trial, apparently took judicial notice that the three named establishments were located on "either side" of the *Carousel*. S & H did not request such judicial notice and there was no testimony to support such a finding.

More importantly, there was no evidence that Leonard had remembered the three establishments in 1981, at the time of publication. Leonard had been to St. Thomas at least twice since 1981 in connection with proceedings in this case, and therefore had post-publication opportunities to learn the names and locations of the three stores. In any event, Leonard was not asked any questions concerning the state of her memory at the time of publication.

[which] can not supply the place of proof." *Cf. Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 578 (1951). Since actual malice must be proven by clear and convincing evidence, disbelieved testimony is not a sufficient basis for drawing a contrary conclusion. *Bose*, 104 S.Ct. at 1966, *citing Moore, supra*; *see also Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.). In short, there was no "independent evidence" for the District Court's finding of actual malice. *Bose*, 466 U.S. at 498.

Moreover, even if Leonard had seen the *Carousel*, or had heard of it, or had otherwise been aware of it at one time, there was no evidence that such awareness had been "brought home" to her conscious mind at the time of the publication, and that she had acted with actual malice in the face of such knowledge. Smith had been asked to submit a work of fiction, "very hot".[13] By the delivery of "Savage Lust," he had represented that the story was indeed fiction. [App. J at 100a]. "Nothing whatsoever" in the story alerted Leonard to its defamatory potential. *Cf. Gertz*, 418 U.S. 347-48. In any event, even the Plaintiff did not contend that Leonard and/or Kirschenbaum were aware of S & H, or that the story made "specific reference" to S & H, as opposed to the *Carousel*.

The District Court attempted to bolster its finding of actual malice from the "fact" that it was an "established policy" for High Society to require its authors to sign a purchase order form containing a representation that the work would not infringe upon any right of any person or entity, whereas Smith never signed such a form. [App. B at 21a]. This finding was constitutionally deficient because it was fundamentally unfair to Drake and without any support whatsoever in the record.

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[13] Deposition of Smith, Appendix J at 96a, introduced into evidence by Drake.

On direct examination, Leonard was questioned in general terms about Drake's reliance on the author's representations, as contained in the purchase order form. [App. F at 51a-53a]. S & H objected on the grounds that Smith did not sign the purchase order form for the story at issue herein. [*Id.*]. The Court sustained the objection, and further prohibited defense counsel from asking, or Leonard from testifying, as to the standard operating procedure with respect to purchase order forms, or whether Drake required authors to execute same. [*Id.*]. The Court further sustained S & H's objections and refused to hear any testimony as to Smith's understanding of the purchase order, or Drake's understanding of Smith's endorsement of the payment check for "Savage Lust". [*Id.* at 53a-54a]. Thus, not only is the record devoid of any evidence as to Drake's "established policy" with respect to obtaining an author's signature on the purchase order form, but the District Court actually blocked each attempt by Drake to introduce any evidence on this topic. Moreover, it is noteworthy that Drake's standard purchase order form does not contain a line or space for the author's signature [App. E at 33a-34a].

Thus, the Court committed error of a constitutional magnitude in predicating its actual malice conclusion at least in part on an "established policy" by Drake requiring the author's signature on the purchase order form.

Having found knowledge of the *Carousel* on the part of Leonard and Kirschenbaum, and a failure to follow established procedures with respect to the purchase order form, the District Court held that Drake had a "duty to insure [sic] that any *story* published in its magazine which named the *Carousel Restaurant* located in St. Thomas, Virgin Islands did not contain false statements." (emphasis supplied) [App. B at 14a]. Taken literally, the District Court's order would preclude, on pain of at least substantial presumed damages, (1) any fictional

treatment (which by definition would be "false") of the real *Carousel* and (2) any fictional treatment of *any* fictional Restaurant named *Carousel* and located, by coincidence or otherwise, on St. Thomas, Virgin Islands. The law of defamation has never swept so broadly, or chilled the writing of fiction so indiscriminately.

Moreover, the far-reaching implications of the District Court's ruling with respect to the literally infinite number of fact patterns which might later be presented, and which are impossible to fully anticipate at the time of publication,[14] gives rise to First Amendment concerns far beyond the facts and circumstances of this particular case.

The lower court's finding of actual malice by Drake under these facts raises serious questions concerning the application of the actual malice test to works of fiction. This Court should grant the Writ of Certiorari to delineate the First Amendment rights and duties of publishers of fiction.

III. THIS CASE RAISES FUNDAMENTAL QUESTIONS OF FIRST AMENDMENT LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT CONCERNING THE APPLICATION OF THE "OF AND CONCERNING" TEST TO WORKS OF FICTION

In the absence of local law, the courts of the Virgin Islands are directed by statute to look to the Restatements of the Law as promulgated by the American Law

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[14] *Query*: For example, would a fictional reference to a "Merry-Go-Round" Bar, or the Clarosel Bar, on St. Thomas, Virgin Islands also be prohibited as a thinly disguised reference to S & H? What about a fictional *Carousel Bar* on St. John, or St. Croix, or on any of the other hundreds of outlying islands and cays in the Caribbean? Under the District Court's standard no publisher of fiction ever could reasonably assess his potential liability or ever reasonably ensure that his publication would not be actionable.

Institute. Title 1 V.I.C. § 4. There is no civil local law in the Virgin Islands on defamation, and therefore, the Restatement (Second) of Torts (1977) is considered controlling. Pursuant to § 564 of the Restatement, *supra*, the "of and concerning" requirement is met where the reader actually and reasonably believes that the communication was intended to portray the Plaintiff. Mere similarity of names is not enough to establish the "of and concerning" element. *Id.* § 564, Comment *d.*

Under this Court's decisions, the "of and concerning" requirement is one of constitutional significance under the First Amendment. *New York Times v. Sullivan*, at 288-292; *Rosenblatt v. Baer*, 383 U.S. 75, 81-83 (1966). This has been interpreted to mean that this Court was suggesting that proof on this issue must be made by clear and convincing evidence. *See* Restatement, *supra*, § 580A, Comment *f.* Other courts and commentators have agreed that the of and concerning requirement must be established by clear and convincing evidence. *See Powers v. KIRO, Inc.*, 13 Med.L.Rptr. 1327, 1329 (Wash.Ct.App. 1986); *Sims v. KIRO, Inc.*, 580 P.2d 642, 645-46 (Wash.Ct.App. 1978), *cert. denied*, 441 U.S. 945 (1979); Note, *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 Yale L.J. 520, 538 (1983). In addition, plaintiffs must show that the publication made "specific reference" to them, *Rosenblatt v. Baer*, 383 U.S. at 83, and to "no one else." *Newspapers Inc. v. Matthews*, 339 S.W.2d 890 (Tex. 1960); *Corr v. Sun Printing & Publishing Ass'n*, 69 N.E. 288 (N.Y. 1904); *Hanson v. Globe Newspapers Co.*, 34 N.E. 462 (Mass. 1893), *overruled on other grounds, N.E. Tractor-Trailer Training, Inc. v. Globe Newspapers Co.*, 395 Mass. 471 (1985); Note, *"Clear and Convincing" Libel*, *supra*, at 538; *accord Farber v. Cornils*, 487 P.2d 689 (*id.* 1971); *Brodsky v. Journal Publishing Co.*, 42 N.W.2d 855 (S.D. 1950).

Throughout these proceedings, Drake consistently has argued for the application of the clear and convincing standard to supplement the requirements of § 564 of the Restatement. Drake contends that such supplementation of § 564 is necessary under the First Amendment. A publisher's liability, otherwise, could be premised upon the mere erroneous belief of a reader that a fictional character was intended to portray the plaintiff, so long as that reader's belief was reasonable. The standard as set forth in § 564 does not adequately protect publishers of fiction from coincidental similarities with one or more real private persons, or from the wayward writer who targets one or more private persons but fails to provide full disclosure. Hence, to adequately protect publishers of fiction, Drake submits that the defamation plaintiff must show, by clear and convincing evidence, that the story *specifically* referred to him, and to no one else. Mere similarities between fact and fiction are not enough, because, as the Seventh Circuit observed, "suggestion is not identification." *Wheeler v. Dell Publishing Co.*, 300 F.2d 372, 376 (7th Cir. 1962).

The District Court *sub silentio* overruled Drake, by looking merely to the existence of "similariites" and "differences" between the real restaurant and the fictional *Carousel Bar*. The District Court found a number of similarities, and thereby held that readers could and did reasonably believe that "Savage Lust" portrayed the *Waterfront Cafe*, known locally as the *Carousel Restaurant*, and thus its owner, S & H.[15]

Among the similarities noted by the District Court were the following: [16]

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[15] The District Court entered no finding that readers believed that the story was *intended* to portray the real *Waterfront Cafe* or S & H. *Cf.* Restatement, *supra*, § 564, Comment *a*.

[16] Although this Court does not ordinarily sit to review facts, the factual analysis set forth herein is appropriate for two reasons. First, it may provide this Court with a more concrete

1) The real *Carousel* was popular with tourists and sailors, as was the fictional *Carousel.*

2) The *Greenhouse*, a bar and restaurant which neighbored the real *Carousel* on the Waterfront, also was popular with sailors, and harbored Puerto Rican prostitutes, who would sell their services to same in the back room of the bar. The fictional *Carousel* was "complete" with "half-naked Martinique whores."

3) The illustration preceding the story pictured two islands across the bay, which was similar to the scene one would observe from the Waterfront area of the real *Carousel.*

4) The buxom woman in the illustration was intended to depict the Margo Boland of the story, who was blond. Samad's girlfriend, who worked at the real *Carousel*, was described as buxom and blond; therefore, the Court concluded that the illustration, through the story, was intended to depict Samad's girlfriend,[17] despite the fact that she never testified, and that no picture of her ever was produced.

The dissimilarities and discrepancies between fact and fiction, which either appear on the face of the story or which were specifically noted by the District Court, but given insufficient weight, were as follows:

1) The fictional *Carousel* was located in an isolated barrio in Frenchtown, not on the St. Thomas

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understanding of the "of and concerning" issue at stake. Second, and more importantly, it explains in part the error of the district court in its alternative holding that Drake "acted with reckless disregard as to the truth or falsity" of its publication. [App. B at 14a]. Since this is the second component to the court's actual malice determination, it is subject to this Court's independent examination as a "constitutional fact" under *Bose.* The many discrepancies between fact and fiction thus are relevant both to the "of and concerning" issue and the recklessness component of the actual malice issue.

[17] S & H introduced no evidence on the knowledge or the state of mind of the illustrator. *See* discussion in Statement of the Case.

Waterfront. The water scenes from the two areas, as the Court noted, were markedly different;

2) In any event, the story and the illustration were inconsistent with one another. In the story, Margo Boland, who is described as blond, is chained to a mattress spring on a cement dock at Conrad's *house*, which is on the Atlantic coast of St. Thomas; in the illustration, the woman, who is a redhead, is casually strapped to a divan (and in no apparent pain) in front of a water scene which the Court characterized as "similar" to the waterfront scene from the real *Carousel*, located on the Caribbean coast of St. Thomas. Samad's girlfriend, who had worked at the *Carousel*, had never been chained anywhere;

3) Boland, unlike Samad's girlfriend, was a cruise-ship tourist, did not live on St. Thomas, and never worked at the fictional *Carousel;*

4) The fictional *Carousel* was purchased with cash by Conrad. The real *Carousel* was purchased by the Plaintiff's corporation with loans and owner financing;

5) The real *Carousel* was a "respectable establishment" not frequented by prostitutes, in contrast both to the fictional *Carousel* and the real *Greenhouse;*

6) S & H did not own the trade name *Carousel* and did not have a business license in that name. Rather, its trade name and business license were in the name of "Waterfront Cafe;" [18]

7) Perhaps most significantly, by virtue of the Court's opinion, the portrayal of Jackson Conrad, the owner of the fictional *Carousel*, was not "of and concerning" Jaber Samad, the sole shareholder of S & H, which owned the real *Carousel.*

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[18] Registration of trade names and procurement of a business license are both statutorily required in the Virgin Islands. 11 V.I.C. § 1203 (1987), 27 V.I.C. §§ 301 *et seq.* (1957).

Accordingly, there was no clear and convincing evidence that "Savage Lust" specifically referred to S & H. Even under an ordinary preponderance standard, the District Court committed constitutional error in finding that the story was of and concerning S & H. *Cf. Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141 (4th Cir. 1969); *Wheeler v. Dell Publishing Co.*; *Springer v. Viking Press*, 457 N.Y.S.2d 246 (App.Div. 1982), *aff'd* 470 N.Y.S.2d 579 (1983).

In any event, even if there were arguable similarities between the real and fictional *Carousel*, there was absolutely no defamation that was of and concerning S & H. This is because the name *Carousel* represented merely a trade name, or at best, locally stood for a bar and restaurant.

It is settled law that although persons, partnerships and corporations enjoy a right to sue for defamation, *see* Restatement, *supra*, §§ 559, 561, 562, a trade name does not. A defamatory remark, aimed at a trade name, is actionable only if it identifies or otherwise is of and concerning the owner of the trade name. *Newspapers Inc. v. Matthews*, *supra*, (the trade name "Texas Body Shop" lacked a cause of action for defamation). Since S & H did not lawfully own or use the trade name *Carousel*, or otherwise enjoy any rights to that name, a reference to *Carousel* was not a reference that was of and concerning S & H. *See e.g. Goldstein v. KDFW et al.*, 541 S.W.2d 862 (Tex.Civ.App. 1976) (plaintiff could not maintain a cause of action for the defamation of the "Honest Joe Pawn Shop," because *inter alia*, she acquired the nickname "Honest Joe" after the shop's license for pawnbroking had expired).

Moreover, a derogatory reference to a place, a building or a business establishment is not, without more, of and concerning the owner thereof.[19] *See El Meson*

[19] The good reasons for such a rule are amply demonstrated by this case. The *Carousel* had existed for over twenty (20) years,

Espanol v. NYM Corp., 521 F.2d 737, 739 (2d Cir. 1975) (defamation of a place is not defamation of the owner); *Grisanzio d/b/a Capri Restaurant v. Rockford Newspapers, Inc.*, 477 N.E.2d 805, 809 (Ill.App.Ct. 1985), (a defamation of the property and building housing the Capri Restaurant was *held* not defamatory of the owner of the Restaurant); *Hatjioannou v. Tribune Co.*, 8 Med. L.Rptr. 2637 (Fla.Cir.Ct. 1982); *Ithaca College v. Yale Daily News*, 7 Med.L.Rptr. 2510 (N.Y.App.Div. 1981) (statement that sex, drugs and booze "are the staples of life" at the plaintiff college was not a statement that the college condoned or sanctioned these activities).

Where the Plaintiff is a corporation for profit, it is defamed only if the remark assails the corporation's "financial position, its business methods, or accuses it of fraud or mismanagement." *See Novick v. Hearst Corp.*, 278 F.Supp. 277, at 280 (D.Md. 1968), *quoting Life Printing & Pub. Co. v. Field*, 58 N.E.2d 307, at 310 (Ill.App. 1944). *Accord* Restatement, *supra*, § 561(a); *Golden North Airways, Inc. v. Tanana Pub. Co., Inc.*, 218 F.2d 612 (9th Cir. 1954). These rules help to ensure that the of and concerning requirement is properly applied.

In the instant case, the story did not charge fraud or mismanagement against the corporation, its business methods or practices. Contrary to the District Court's

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all but the last two of which were under the ownership of Hagan House. S & H in turn sold the restaurant to one William Slough. If the *Carousel qua Carousel* could be defamed, then Tallman, S & H, Slough, and any other prior or subsequent owner would have a cause of action against Drake.

The law has never countenanced or contemplated multiple judgments in favor of multiple plaintiffs arising out of a purported defamation of one person or entity. See e.g. *Hanson v. Globe Newspapers Co.*, 34 N.E. at 464 (a defamation of "John Smith, of Springfield" gives rise to a cause of action in favor of only one John Smith, even if there are five persons so named in Springfield.)

conclusions, there is no statement, implication, or innuendo in the story that drugging, or kidnapping, are "normally acceptable" behavior at the *Carousel*, or, in fact, that any such activities ever had previously or subsequently occurred. The things that were done to Margo Boland were done by the individual Jackson Conrad for purely personal and private reasons, having nothing to do with the operation of the *Carousel*. In short, they were done by Conrad as a warning to Boland to keep his identity and whereabouts on St. Thomas a secret. These acts were not specifically referable to S & H, particularly since, as the District Court recognized, the fictional Conrad did not specifically refer to Samad.

Moreover, the only remarks which arguably could be considered derogatory, *e.g.* the *Carousel's* portrayal as a "sailors' dive" and as a "symbol of tropical decadence and moral decay" were neither of and concerning S & H, nor were they actionable, inasmuch as they contained no false statement of fact. *See Hustler Magazine v. Falwell*; *Gertz v. Robert Welch, Inc.*; *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Pub. Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970); *Avins v. White*, 627 F.2d 637 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1982).

Furthermore, the circumstance that the *Carousel* was "complete" with Martinique prostitutes reasonably means only that one may "*meet*" such persons there. There is not even the barest hint that they were officially sponsored or sanctioned, or even that they were actively plying their trade at the *Carousel*. *Cf. Miss America Pageant Inc. v. Penthouse Int'l, Ltd.*, 524 F.Supp. 1280, 1287 (D.N.J. 1981) (portrayal of half-naked contestant is *not* a statement about the plaintiff); *El Meson Espanol v. NYM Corp.*, 521 F.2d at 740 (owner is not "responsible for the character of his guests.") In any event, the word "complete," as used in context, is imprecise, incapable

of a literal interpretation, and therefore unverifiable. *Cf. Ollman v. Evans.*

Accordingly, the proof was "constitutionally deficient" on the of and concerning issue. *See New York Times*, 376 U.S. at 288-92. This Court has independent appellate review power on the of and concerning issue, as it does on the actual malice issue. This Court should grant a Writ of Certiorari to settle the burden of proof and the standards of appellate review on the of and concerning issue as applied to works of fiction.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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August 29, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE AND RUSSELL SMITH

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,

DRAKES PUBLISHERS, INC., d/b/a/
HIGH SOCIETY MAGAZINE,
Appellant

On Appeal from the United States District Court
of the Virgin Islands (St. Thomas)
(D.C. Civil No. 82-0026)
District Judge: Almeric L. Christian

Argued April 19, 1988

Before: SEITZ, SLOVITER and BECKER,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Each party to bear its own costs.

Attest:

/s/ Sally Mrvos
Clerk

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: Apr. 29, 1988

APPENDIX B

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD
S & H MANAGEMENT CORP.,
Plaintiff,
v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant.

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MEMORANDUM OPINION

CHRISTIAN, Chief Judge

I

INTRODUCTION

Were the issue presently before this Court whether the published story which forms the basis of this lawsuit were more properly and accurately described as "smut" as counsel for plaintiffs disdainfully styled it, or "sophis-

ticated gentlemen's entertainment," as the publisher of the magazine which carried the story proudly proclaimed it, the conflicting contention would be utterly facile of resolution. The case with which the Court is faced, however, is an action for defamation[1], spawned by the publication of a fictional short story, "Savage Lust", in the December, 1981, issue of a magazine which appears on the newsstand under the euphemistic appellation, *High Society*.

Plaintiff, Jaber Samad, was president and sole shareholder of S & H Management Corporation ("S & H"), the co-plaintiff, which operated a bar and restaurant called, and widely known as, The Carousel. Defendant, Drakes Publishers Inc., is the successor in interest to High Society, Inc. ("High Society"), the original defendant, by which the magazine High Society was, at times pertinent herein, published.

The story "Savage Lust" was authored by one Russell Smith, who had once been employed as an editor by a sister publication of *High Society*. Although a co-defendant throughout most of the litigation, Mr. Smith was severed from the action on August 12, 1985 on stipulation of both sides. He was a free lance writer, however, at the time he was approached by an editor of *High Society* to write a short story.

"Savage Lust" is the story of Jackson Conrad who once tended bar in a city on the mainland. He fled to St. Thomas after having embezzled all monies from his employer's several bank accounts. In St. Thomas he assumed an alias, Jack O'Connor, and bought a bar, the "Carousel," for cash.

The fictional Carousel is located in an "isolated barrio" in the Frenchtown section of St. Thomas in the "U.S.

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[1] This case was tried to the Court and submitted after extensive post-trial written summations.

Virgins", and is described as a "sailor's dive complete with half-naked Martinique whores" and a "symbol of tropical decadence and moral decay." It is here that Conrad encounters a woman from his past, Margo Boland, who nurtures an unsatisfied lust for the mysterious Conrad. She is drugged and then taken to Conrad's secluded beachfront residence where she is chained to the deck. After several hours in this position she is forced to engage in a night of sodomy with Conrad and his servants.

The plaintiffs, believing the story to be about Samad and the real Carousel, sued to recover for injuries resulting from the allegedly defamatory storyline of "Savage Lust."

II

FACTUAL BACKGROUND

A real bar and restaurant known as the "Carousel Bar" was located on the waterfront in St. Thomas, about a mile from Frenchtown. The bar was popular with both sailors and tourists.

Although its registered name was the "Waterfront Cafe," the establishment was well known as the "Carousel" to local residents and visiting tourists alike. The bar had been operated by a former owner, John Tallman, for a number of years as the "Carousel Bar." Tallman did not sell the rights to the name when he sold the bar to Samad. A large metal sign with the name "Carousel" hung outside the bar during the entire period that the business was owned and operated by S & H.[2] A sign with the name, the "Waterfront Cafe" hung below the "Carousel" sign.

Russel Smith was well aware of the existence of the real Carousel bar when he wrote the story. Smith had

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[2] The sign "Carousel" hung outside the bar from 1963 to 1983.

lived in St. Thomas for a period of six or seven months during the 1960's. He returned to the island in November of 1980. During this stay he visited the Carousel in search of his acquaintance, John Tallman. Moreover, one of Smith's wives had worked at the Carousel during Tallman's proprietorship.

Smith and a female companion [3] made several visits to the Carousel in November, 1980. During these visits he became acquainted with Samad. The relationship began on friendly terms until Smith proposed that Samad engage in a sexual relationship, a veritable *menage a trois*, wholly unimagined by Samad, with Smith and his female companion. Samad adamantly refused and angrily, and with vile epithets ordered Smith to leave the premises, or face bodily ejection.

Samad and Smith met again in June, 1981. Smith then asked Samad if he could write a story about him (the plaintiff). Samad vehemently refused to give permission. Smith returned to New York and in July 1981, submitted "Savage Lust" to High Society.

It was an established policy of High Society that all writers who submitted articles or stories which were accepted for publication must sign a "purchase order" before payment would be remitted. In the said purchase order there was a disclaimer which provides that publication [would] not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity.

Smith never signed a purchase order. Despite this, Gloria Leonard, *High Society's* publisher, accepted the story for publication.

Leonard knew of the existence of the real Carousel. Leonard had resided in nearby Puerto Rico for a period

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[3] Plaintiff Samad refers to this woman as Smith's wife. At his deposition, however, Smith referred to her as his girlfriend.

during the 1960's, at which time she had made frequent visits to St. Thomas. The Carousel was then in its heyday. At trial, Leonard testified that she had no knowledge of the existence of the real Carousel. She had had occasion to walk along the waterfront several times. She testified that she could recall the businesses located on either side of the bar. Since her relocation to the mainland, Leonard returned to St. Thomas five or six times. We find that Ms. Leonard's testimony was incredible in that it reflected a selective memory failure. We find, therefore, that she knew of the Carousel's existence. Moreover, Ira Kirshenbaum, vice-president of High Society, testified that he had also visited St. Thomas before the publication. His claimed lack of knowledge of the Carousel is likewise unworthy of belief and I find to the contrary.

A friend of both Samad and his girlfriend, who lived in Boston, there happened to read "Savage Lust." Apparently believing that the story was about Samad and his business place, he called Samad by telephone and told Samad about the story. Shocked and boiling mad, Samad at once purhcased his own copy of the magazine at a local store and read the story.[4]

Samad believed the story had been written by Smith about him and his bar in retaliation for Samad's vehement refusal of Smith's sexual proposition. A distraught Samad told his brother, Foad about the story. Foad [who was able to procure the last available copy of the magazine] in turn contacted the rest of the Samad family about the story. His family became alarmed at Samad's seemingly decadent lifestyle, forced him to give up his

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[4] During this period approximately 275 copies of *High Society* were sold monthly from newsstands in the Virgin Islands. Defendant derived annual revenues of $5,841.00 from sales in the Territory. Consequently, by Order dated April 9, 1984, we held that the jurisdictional requirements of 5 V.I.C. § 4903, and those demanded by the U.S. Constitution had been satisfied.

girlfriend, and tricked him into returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a palestinian young lady whom he hardly knew, and did not love. The marriage, though consumated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. He did not, however, regain the trust and respect of his family.

III

GENERAL AND CONTROLLING PRINCIPLES

Despite First Amendment ramifications, defamation actions are essentially territorial causes of action. *McDowell v. Paiewonsky*, 769 F.2d 942, 945 (3d Cir. 1985); *Marcone v. Penthouse International Magazine For Men*, 754 F.2d 1072, 1077 (3d. Cir. 1985). Accordingly, adjudication of the case, *sub judice* requires analysis under both Virgin Islands and Federal Law. *McDowell v. Paiewonsky*, 769 F.2d at 945. If the Court determines that defendant has injured plaintiff's reputation under the applicable territorial law, we must then determine whether the imposition of liability is nonetheless prohibited by First Amendment considerations. *Steaks Unlimited v. Deaner*, 623 F.2d 264, 270 (3rd Cir. 1980).

The rules of the common law, as expressed in the Restatement (Second) of Torts have been adopted by the Virgin Islands as the substantive law governing defamation actions.[5] *McDowell*, 769 F.2d at 945; 1 V.I.C. § 4 (1967).

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[5] V.I. Code Ann. Tit. 1, § 4 (1967) provides that:

> "The rules of the common law, as expressed in the Restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in absence of local laws to the contrary."

Liability for defamation is created where there is:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Plaintiffs have the burden of proving each of the above elements. *Id.* at 613.

There is no liability if the communication was privileged. Defendant had the burden of showing the existence of a privilege as provided in RESTATEMENT (SECOND) OF TORTS § 613(2) (1977). Defendant, however, did not raise this issue and the existence of such privilege is not apparent. Accordingly, we conclude that the requirement of unprivileged publication to have been satisfied.

(a) THE STATEMENT PUBLISHED MUST CONCERN THE PLAINTIFFS

Plaintiffs must show that the recipients of the communication "correctly, or mistakenly but reasonably, understands that it was intended to refer" to them. RESTATEMENT (SECOND) OF TORTS § 564 (1977). *See also Id.* at 558.

Defamatory statements found in works of fiction are actionable. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977). The fact that fiction purports not to concern real persons or events is of no consequence in determining the merits of a defamation action. Note,

girlfriend, and tricked him into returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a palestinian young lady whom he hardly knew, and did not love. The marriage, though consumated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. He did not, however, regain the trust and respect of his family.

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"Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520, 536-37 (1983); *see also Fetler v. Houghton Mifflin Company*, 364 F.2d 650, 653-54 (2nd Cir. 1966).

Works of fiction are actionable if the reader reasonably understands that the characters are a portrayal of the plaintiff. *See, e.g., Geisler v. Petrocelli*, 616 F.2d 636, 639 (2nd Cir. 1980); *Middlebrooks v. Curtis Publishing*, 413 F.2d 141 (4th Cir. 1969). The identification of the plaintiff with the fictional character is reasonable if the description of the character and the events contained in the narrative are so similar to reality that those acquainted with the plaintiff would understand that the plaintiff is the character so depicted. *Felter*, 364 F.2d at 651. Mere similarities of name or other superficial similarities will not suffice. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977); *Middlebrooks*, 413 F.2d at 143. Furthermore, testimony that someone understood that the character depicted the plaintiff does not satisfy this test. *Id.*

The plaintiff produced witnesses at trial who testified that they actually believed "Savage Lust" was written about Samad and the Carousel. Neither the physical person of Samad, nor the events of his life, parallel those of the fictional Conrad. Plaintiff is Jordanian; he migrated to St. Thomas from Palestine as a young boy.[6] He attended Charlotte Amalie High School and the College of the Virgin Islands. Samad left the islands to attend the Greater Community College in Connecticut. Upon his return to St. Thomas, he purchased the Carousel. The purchase was partially financed by John Tallman, a former owner by means of a promissory note. Samad

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[6] We draw no support from defendant's argument that plaintiff is Jordanian and Conrad is caucasian. From the sparse physical description of the character, we are unable to discern the race of Conrad.

borrowed money from Barclay's Bank and his brothers to make the necessary downpayment.

Moreover, Samad neither lived with servants, nor did he live on a secluded beach. Rather, he shared a studio apartment with his girlfriend. The apartment was located on a popular St. Thomas beach. He was not rich, nor did he employ servants.

The only similarity between Samad and Conrad is their association with a bar named the Carousel.[7] In light of the marked differences between the two men, no identification of the two as the same person would be reasonable. Thus, we need not consider further the merits of Samad's claims.

Our finding that the story was not "of and concerning" Samad does not mandate a finding that S & H Corp. was not defamed. The dissimilarities between Samad and Jackson would not necessarily prevent patrons of the bar, and others, from reasonably believing that "Savage Lust" was written about the Carousel.

Both bars are known as the Carousel. Both border on the St. Thomas Waterfront. Like the fictional bar, the real Carousel was located in the "U.S. Virgins", and was popular among tourists and was a heavy favorite of sailors of the United States Navy, when on shore leave. Samad's girlfriend, who is tall, blond, and buxom is similar in appearance to the drawing of a woman in the illustration accompanying the story. Samad's girlfriend sometimes worked at the establishment, and, in any event, was there very frequently. While the woman in the illustration appears to have red hair with blond streaks, the caption beside the picture describes Margo Boland as a blond. And, since the Court finds that the

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[7] Conrad actually own the fictitious bar. The real carousel, however, was owned by S & H. Samad was the sole shareholder of S & H.

picture, of a woman chained to a divan, is intended to depict Margo Boland, the Court similarly concludes that the illustration is that of a blond woman, generously appointed in the area of the bosom, as Samad's girlfriend was described in the testimony.

Furthermore, the Greenhouse, a bar and restaurant located next door to the Carousel was rumored, during that period, to harbor prostitutes from Puerto Rico who would sell their services to sailors in backrooms of the bar.[8] These rumored activities and the proximity of the Greenhouse to the Carousel, both highly popular with sailors on leave, reinforces the reasonableness of the belief that "Savage Lust" was written about the Carousel.[9]

We are not dissuaded by the fact that the fictional Carousel is located in Frenchtown. The area of St. Thomas known as Frenchtown lies about a mile, or less, from the section of the Waterfront, at which the real Carousel is located. The illustration which accompanied the story pictured two islands across the bay. This scene is similar to that which one would observe looking sea-ward from the waterfront area in the vicinity of the real Carousel, and bears little, or no, resemblance to the water scene looking out from Frenchtown.

In light of the above similarities a reader could reasonably believe, as readers did reasonably believe, that "Savage Lust" portrayed the real Carousel and activities conducted therein. Consequently, the Court finds that the story was of and concerning the Carousel bar and restaurant operated in St. Thomas, in the United States Virgin Islands by S & H.

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[8] These rumors indeed subsequently became a confirmed fact when a physical altercation between a sailor and one of these "ladies of the night" in a backroom of the Greenhouse ended up before this Court in feloney charges docketed at Criminal No. 82-106.

[9] As stated above, the bar was well known locally and elsewhere as the Carousel. Thus, we attribute no significance to the fact that the registered name of the bar was the "Waterfront Cafe."

(b) THE STATEMENT MUST BE FALSE AND DEFAMATORY

A communication is defamatory if it tends "to harm the reputation of another" and "lower him in the estimation of the community or . . . deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS (1977). "A corporation . . . cannot be defamed by words . . . which would affect the purely personal repute of an individual. W. Prosser, Law of Torts § 111, at 739 (4th ed. 1977). A corporation, however, does have a business reputation, and may maintain an action when the publication of a false statement adversely affects it in the conduct of its business or deters others from dealing with it. *Id.* at 745; RESTATEMENT (SECOND) TORTS § 561 (1977).

The corporation need not be specifically named; defamation may be by implication. Note, "Corporate Defamation and Product Dispargement: Narrowing the Analogy to Personal Defamation," 75 Colum. L. Rev. at 966. Moreover, liability exists if the publisher wrongfully led the recipients of the statement to believe that the corporate owner knowingly acquiesced or participated in immoral activities on its premises. *Id.* at 967 n. 24. Cf. *El Meson Espanol v. NYM Corporation*, 521 F.2d 737, 740 (2d Cir. 1975).

"Savage Lust" protrays the Carousel as a "sailor's dive" where one can meet "half-naked Martinique whores. The bar is further described as a "symbol of tropical decadence and moral decay." The fictional Carousel is a place where a female customer can be drugged and from which she can be kidnapped—by the owner.

Based on the above portrayal of the bar's management, a reader could reasonably infer that the owner's actions, at a minimum, amounts to knowing acquiescence in immoral and illegal conduct on the premises. Such

a belief would deter a desirable clientele from patronizing the bar.

Furthermore, the representation that such behavior was normally acceptable in the bar is clearly false. The real Carousel was a respectable establishment and not a place frequented by the type of disreputable characters depicted in the story. In these circumstances, we conclude that S & H has carried its burden of proving that the communication published by High Society is both false and defamatory.

(c) THERE MUST BE FAULT ON THE PART OF THE PUBLISHER

Addressing the issue of fault, we find that High Society has, and had at the time here pertinent, a firm policy of not depicting real places in their fictional stories. In order to insure that such stories do not portray real places, High Society requires its authors to sign a purchase order containing a disclaimer. Smith never signed the required disclaimer. In addition, both Leonard, the publisher who accepted the story for publication, and Kirshenbaum, the vice-president of High Society, knew of the existence of the real Carousel located in St. Thomas. Under the circumstances, defendant had a duty to insure that any story published in its magazine which named the Carousel Bar located in St. Thomas, Virgin Islands did not contain false statements. Defendant, as we have found, knew, because its principal officers knew, of the existence of the Carousel, its true nature and its actual activities. Thus, we attribute to defendant, the knowledge that such statements were false. But even giving the defendant the benefit of any doubt that there might be, if it did not truly know that those statements were false, it acted with reckless disregard as to the truth or falsity of such statements. Thus, S & H has satisfied its burden of proof regarding the culpability of defendant.

(d) PROOF OF SPECIAL HARM IS NOT REQUIRED

Special harm is defined by the RESTATEMENT (SECOND) OF TORTS, as the loss of something having pecuniary or economic value. RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977). Plaintiff's proof presented at trial consisted solely of Samad's own self-serving testimony. There was no corroborating evidence of economic loss. Such proofs are insufficient to demonstrate loss of income. *Connally v. Chardon*, 1978 St. X Supp. 372 (DVI 1978).

A corporation, however, may maintain an action for defamatory words which discredit it and tend to cause loss to it in the conduct of its business. RESTATEMENT (SECOND) OF TORTS § 561 comment b (1977). Such a statement is actionable per se. Damages are assumed to flow from the publication of statements of this nature. Thus, proof of special harm is not required. *Id.* at § 621 comment a.

The publication of "Savage Lust" satisfies the foregoing test. The story, if read and believed by certain potential customers, would dissuade them from patronizing the Carousel. Such being the case, no proof of economic loss is necessary.

(e) CONSTITUTIONAL LIMITATIONS

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that the First Amendment limits the reach of state defamation laws. The Court found that the First Amendment afforded one the right to criticize public officials, without the common law defamation restraints. *Id.* at 269. The Court held, therefore, that a public official cannot recover damages for defamatory falsehoods absent proof that such a statement was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

The Supreme Court further explicated the limits of the First Amendment on state defamation law in *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974). *Gertz* involved the issue of whether a plaintiff who was not a public official could recover damages for statements which constituted libel per se under Illinois Law. The statements which constituted libel per se under Illinois Law. The statements in *Gertz* involved an issue of public concern. The Court weighed the competing interests of a state to protect its citizens from defamatory falsehoods against the First Amendment concern of free debate on public issues. Striking a balance, the Court held that:

> "So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Id. at 347.

The High Court opined that the legitimate state interest in compensating private individuals for injury to reputation extended only to compensation for actual injury. Thus, the Court reasoned that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

The Supreme Court made its latest pronouncement on the interplay between state defamation law and the First Amendment in *Dunn & Bradstreet, Inc. v. Greenmoss*, —— U.S. ——, 105 S. Ct. 2939 (1985). *Dunn & Bradstreet* involved the defamation of a private plaintiff regarding a matter of purely private concern.[10]

The Court held that under the circumstances presented by *Dunn & Bradstreet*, the award of presumed and puni-

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[10] As in *Dunn & Bradstreet*, S & H is also a private plaintiff involved in a matter of private concern.

tive damages on a showing of mere negligence was constitutionally permissible. We note that a state or territory is still free to choose for itself the appropriate standard of culpability required prior to the imposition of liability in a defamation action which involves a private plaintiff and a dispute over private concerns.

As stated above, defendant acted with culpability sufficient to satisfy the 'actual malice' standard announced in *New York Times.* Therefore, regardless of the standard chosen by the Virgin Islands, liability for presumed damages will be imposed in this case. As a consequence, we do not decide if negligent actions would be sufficient to justify the imposition of liability. Such a case is not before us.

While we are content to rest our decision that plaintiff S & H was indeed defamed by defendant, and is entitled to an award of money damages, even in the absence of proof of actual or special loss, we feel moved to note a further basis of liability in this cause.

The Supreme Court in *Dunn & Bradstreet,* held that under the circumstances there presented, the First Amendment does not prohibit the recovery of presumed or punitive damages on a showing of fault less than actual malice. 105 S. Ct. at 2948. The Court did not, however, alter the holding of *Gertz* which provided that states may choose the appropriate standard of culpability required in a defamation action involving a private plaintiff, so long as they do not impose a standard of strict liability. *Gertz,* 418 US at 347.

By adopting the RESTATEMENT (SECOND) OF TORTS, the Virgin Islands has defined the standard of fault necessary to impose liability for defamation actions brought in this territory. Guided by the principles enunciated in *Gertz,* the RESTATEMENT (SECOND) OF TORTS provides that damages which flow from a defamation which is actionable per se must be proven and cannot

be presumed. RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977). The American Law Institute has taken no position on whether recovery, in the absence of proof of actual harm, is permissible when a defendant acted with 'actual malice' as defined by *New York Times*. RESTATEMENT (SECOND) OF TORTS Caveat to § 621 (1977).

In the absence of an existing applicable Virgin Islands statute or relevant section of the RESTATEMENT (SECOND) OF TORTS, we are guided by the general principles of common law.

At common law, a publisher of a false and defamatory statement who acted with 'actual malice' was liable for damages which were assumed to flow from the defamatory statement. *Gertz*, 418 US at 349-50. As stated above, defendants in this action acted with culpability which satisfies the standard of actual malice. That being the case, we conclude that plaintiff may recover presumed damages as caused by the defamatory statements.

IV

CONCLUSION

On all the foregoing this Court concludes that Plaintiff Jaber Samad was not defamed by the publication of the story "Savage Lust" and is, therefore, not entitled to recover from defendant Drakes Publishers, Inc. It is our conclusion, however, that Plaintiff S & H Management Corporation was defamed by the publication of the above-mentioned story and is entitled to recover damages from defendant Drakes Publishers, Inc. in the sum of Seventy-five Thousand ($75,000.00) Dollars, together with partial indemnification for costs and attorney's fees.

DATED: March 2, 1987

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff,

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant.

ETHEL CARR HUNTER MITCHELL, ESQURE
25A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands 00801
Attorney for Plaintiff

JOSEPH B.W. ARELLANO, ESQUIRE
Law Offices of Campbell & Arellano
P.O. Box 11899
St. Thomas, Virgin Islands 00801
Attorney for Defendant

MEMORANDUM AND ORDER

CHRISTIAN, Chief Judge

Defendant Drakes Publishers, Inc. d/b/a High Society Magazine[1] ("High Society") has moved the Court for judgment notwithstanding the verdict or, in the alternative to amend the findings of fact entered in this cause

[1] The instant motion was filed on behalf of High Society Magazine. Drakes Publishers, Inc. has been substituted as defendant in this cause. Accordingly, we will treat the motion as one filed on behalf of Drakes Publishers.

on March 2, 1987.[2] Defendant contends that the relief requested is warranted because the Court mistakenly based its finding that agents of High Society Magazine knew about the existence of the real Carousel upon our disbelief of the testimony given by both Ira Kirschenbaum, vice president of High Society, and Gloria Leonard the publisher of the magazine. Accordingly, defendant argues that our finding that defendant acted with actual malice is not supported by substantial evidence found in the record. For the reasons which follow, the motion will be denied.

(1) It is well settled that "when the testimony of a witness is not believed, the trier of fact may disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumer Union of United States, Inc.*, 104 S Ct. 1949, 1966 (1984). *See also, Nishikawa v. Dulles*, 356 US 129, 136-37 (1958); *Moore v. Chesapeake & Ohio R. Co.*, 340 US 573, 537 (1951). Our finding that agents of High Society knew of the existence of the Carousel located in St. Thomas, however, was not based upon the discredited testimony of defendant's witnesses.

As we stated in our Memorandum Opinion entered on March 2, 1987, Leonard resided in Puerto Rico during the 1960's, at which time she made frequent visits to this island. The Carousel was then at its peak of popularity. Leonard testified that she had occasion to walk along the waterfront several times. At trial, she was able to recall the businesses located on either side of the Carousel. After her return to the mainland, Leonard visited St. Thomas six or seven times. Kirschenbaum also testified that he had visited St. Thomas.

---

[2] This cause was tried to the Court, and not before a jury. A motion for judgment notwithstanding the verdict is, therefore, inappropriate. Consequently, we will treat defendant's motion as one to amend the findings of fact entered in this matter by the Court on March 2, 1987.

(2) It was an established policy that all writers who submitted articles or stories for publication in High Society were required to sign a purchase order. The purchase order contained a disclaimer which provided that the publication would not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity. Leonard accepted the story about the Carousel despite the author's failure to sign the necessary disclaimer.

(3) The Court, as the trier of fact, was permitted to find an ultimate fact to be true upon proof of other facts, if upon consideration of all circumstances revealed by the evidence, the Court was satisfied that in logic and common experience, the ultimate fact was more likely than not to follow from the fact proven. *McInerney v. Berman*, 473 F. Supp. 187, 188 (D. Mass. 1979), *aff'd* 621 F.2d 20 (1st Cir. 1980); *cert. denied* 449 US 867 (1980); *see County Court of Ulster County v. Allen*, 442 US 140 (1979). Inferences from circumstantial facts may constitute complete proof of a legal theory, and may even be strong enough to overcome direct testimony to the contrary. *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), *citing The Wenona*, 86 US 41, 58 (1873).

The inferences which can be drawn from the evidence outlined above clearly supports the finding entered by the Court in this cause.

ORDER

The premises considered, therefore, and the Court being fully advised,

IT IS ORDERED that the motion of defendant Drakes Publishing Inc. d/b/a High Society Magazine to amend

the findings of fact entered in this cause on March 2, 1987 be, and the same is, hereby DENIED.

DATED: July 2, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff,

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant.

JUDGMENT

This action having come for trial before the Court, The Honorable Almeric L. Christian, Chief Judge presiding, and the issues having been duly tried and a decision having been rendered, it is

ORDERED and ADJUDGED that Plaintiff S & H Management Corp. recover from defendant Drakes Publishers, Inc. d/b/a High Society Magazine the sum of seventy-five Thousand ($75,000.00) Dollars with interest from the date of Judgment.

FURTHER ORDERED and ADJUDGED that plaintiff Jaber Samad take nothing and that the action be DISMISSED as to the said plaintiff on the merits.

DATED: July 24th, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
DRAKES PUBLISHERS, INC.,
d/b/a HIGH SOCIETY MAGAZINE,
Appellant

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Drakes Publishers, Inc., d/b/a High Society Magazine, Appellant in No. 87-3583, and Appellee in No. 87-3582, in the above-entitled case having been submitted to the judges who partici-

pated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 31, 1988

APPENDIX D

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER A. SAMAD, and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

MOTION FOR JUDGMENT N.O.V. OR IN THE ALTERNATIVE MOTION TO AMEND FINDINGS

Pursuant to Rules 50 and 52 of the Federal Rules of Civil Procedure, Defendant High Society hereby moves this Honorable Court for judgment n.o.v., or in the alternative for an order amending its Memorandum Opinion of March 2, 1987 in the above-captioned matter. Defendants request the Court to find that neither Gloria Leonard nor Ira Kirschenbaum published the story that was the subject of this case with actual malice, and to enter judgment n.o.v.

In support of this motion, Defendant refers the Court to the accompanying Memorandum of Law.

DATED: March 16, 1987

Respectfully submitted,

CAMPBELL & ARELLANO

/s/ Joseph Bruce Wm. Arellano
JOSEPH BRUCE WM. ARELLANO
4A & B Kongens Gade
P.O. Box 11899
St. Thomas, Virgin Islands
(809) 774-4858

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the the foregoing *Motion For Judgment n.o.v.* as mailed to Ethel C.H. Mitchell, Esq., 25A Dronningens Gade, Suite 1, St. Thomas, Virgin Islands, and mailed, postage prepaid, to Norman Beier, Esq., of Abelman Frayne Rezac & Schwab, 708 Third Avenue, New York, N.Y. 10017, this 16 day of March, 1987.

/s/ Joseph Arellano

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

MEMORANDUM OF LAW

On March 2, 1987, this Court entered a Memorandum Opinion in the above-captioned case. The Court ruled that Defendants had defamed S & H Management Corporation by the publication of a fictional work in the December 1981 issue of High Society magazine. The opinion holds that the High Society story was defamatory, was not "of and concerning" Plaintiff Jaber Samad, but was "of and concerning" the Carousel Bar in St. Thomas. Memorandum Opinion ("*Op.*") at pp. 11-12. The Court went on to find that the story contained false statements, and that the false statements tended to discredit the Carousel Bar to the detriment of its business. *Op. 14.*

Since the Court found that S & H had not proved any actual economic loss, *Op. at 14*, the only basis for the Court's award of damages was a further finding that the publication at issue was defamatory *per se* and gave rise to presumed damages. *Op. at 14.*

The Court also concluded that Defendants had acted with "actual malice" within the meaning of *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Op. 16, 17.* As

a result, the Court held that irrespective of the standard of fault the Virgin Islands might ultimately choose to apply to a defamation case such as this involving a private figure and a matter of no general public concern, High Society's conduct was culpable. *Id.* Alternatively, the Court ruled that under "the general principals of the common law", Defendants were liable for presumed damages because they had in fact acted with "actual malice." *Op. at 18.*

Thus, the Court's finding of liability on the part of High Society depends entirely on its conclusion that Gloria Leonard and Ira Kirschenbaum knew that "Savage Lust" contained falsehoods, or that Leonard and Kirschenbaum published with reckless disregard of the story's truth or falsity.

But there is no evidence in the record that Leonard and/or Kirschenbaum knew the story at issue was false, or that either person subjectively entertained any serious doubts about the story. The only testimony on High Society's knowledge of truth or falsity was by Ms. Leonard and Mr. Kirschenbaum. Both testified that they did not know of the existence of the Carousel Bar. *Op. at 5.* This Court decided that it did not believe the testimony of Leonard and Kirschenbaum, which it obviously is free to do. The Court went further, however, and found affirmatively that High Society (a) believed that "Savage Lust" was about the Carousel Bar and (b) knew that the representation of the Carousel in the story was false. In other words, the Court found affirmative knowledge solely on the basis of disbelief of testimony.

In *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984), defendant published an article evaluating numerous brands of loudspeakers. The article contained the statement that the Bose speakers caused the sound of instruments "to wander about the room." After a bench trial, the District Court concluded that the quoted statement was a false, defamatory statement of fact, and that plaintiff had proved its case

by clear and convincing evidence. *See*, 104 S. Ct. at 1953-55. This finding was based in part on the trial court's disbelief of the testimony of the author of the article.

The Court of Appeals reversed, and in a detailed opinion, the U.S. Supreme Court affirmed the Court of Appeals. Of particular interest to this case was the Supreme Court's holding with respect to the plaintiff's proof of actual malice. The Supreme Court noted that "when the testimony of a witness is not believed, the trier of fact may simply disregard it." However, the Court further held that disbelief of a witness's testimony simply does not constitute the clear and convincing evidence required for a finding of actual malice. 104 S. Ct. at 1966.

See also, *Nishikawa v. Dulles*, 356 U.S. 129, 136-37 (1958) (disbelief by trial court of petitioner's testimony that his service in a foreign army was involuntary insufficient basis for finding, by clear and convincing evidence, that petitioner's service was voluntary); *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573 (1951) (even if trial court disbelieved the only evidence regarding defendant's negligence, plaintiff had failed to sustain her burden of proof, and a judgment for defendant notwithstanding the verdict was proper; standard of proof was mere preponderance of the evidence).

As the Court of Appeals for the Second Circuit has stated:

> *. . . although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him.*

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (Learned Hand); *accord*, *Martin v. Citibank*, 762 F.2d 212, 217-18 (2d Cir. 1985); 9 C. Wright & A. Miller Federal Practice & Procedure: Civil Sec. 2527, at 563:

> *The party with the burden of proof does not make an issue for the jury by relying on the hope that the jury will not trust the credibility of the witnesses. If all of the witnesses deny that an event essential to plaintiff's case occurred, he cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event occurred.*

This case fits squarely within the rule set forth above. This Court's disbelief of the testimony of Ms. Leonard and Mr. Kirschenbaum cannot substitute for clear and convincing evidence of actual malice. "Clear and convincing" evidence is "clear, precise, indubitable, unmistakable and free from serious or substantial doubt." *Manuel v. Fort Collins Newspapers, Inc.*, 599 P.2d 931, 933 (Colo. App. 1979); it is evidence of "high probability, leaving no substantial doubt, and strong enough to command the unhesitating assent of every reasonable mind." *In re David C.*, 200 Cal. Rptr. 115 (Cal. App. 1984).

The evidence of actual malice in this case falls far short of the required standard of proof. Accordingly, for all the foregoing reasons, and all the reasons advanced by Defendants in the record of this case, including Defendant's Motion For Summary Judgment and Motion For Directed Verdict/Closing Argument, Defendant respectfully requests the Court to amend its findings to reflect that there is insufficient evidence on which to find High Society liable to S & H Management Corporation, to vacate its award of damages to S & H, and to enter judgment for Defendants.

DATED: March 16, 1987 Respectfully submitted,

CAMPBELL & ARELLANO

/s/ Joseph Bruce Wm. Arellano
JOSEPH BRUCE WM. ARELLANO
4A & B Kongens Gade
P.O. Box 11899
St. Thomas, Virgin Islands
(809) 774-4858

APPENDIX E

COMPANY NAME HIGH SOCIETY P.O.# 005371
801 Second Avenue
New York, New York
10017

Date: July 17, 1981.

PURCHASE ORDER/REQUEST FOR CHECK

TO:

Seller: Russell Smith Soc. Sec.#: 155-16-6310

Address: 124 Mac Dougal St.

City: New York State: N.Y. Zip: 10012

FOR:

Editorial ☐
Photography: ☐
Modeling: ☐
Illustration: ☐
Cartoon: ☐

Issue No.: Jan. '82
Name of Story: "Savage Lust"
Retitle:

Other:

AMOUNT:

Fee: 400.00 Terms of Payment: 1/2 & 1/2

Prepared By: cmw Approval of Editor:

Signature of Publisher:

NOTES:

_____

_____

_____

_____

Seller hereby sells and transfers to the above-named publication, its successors and assigns, all right, title and interest of every kind (including, without limitation, copyright) in the above-described editorial material, photographs, illustrations or cartoons (as the case may be) and warrants originality, authorship and ownership of the aforesaid contribution, that it has not been heretofore published, and that its publication will not infringe upon any copyright, right of privacy, proprietary or other right of any individual or entity.

Seller warrants that he has or will obtain right of privacy releases from all persons depicted in any above-described photographs, illustrations or cartoons and that the delivery of said releases to the above-named publication is an essential condition of this agreement.

Our Cover: *Anastasia, a Russian contessa (story on page 79)*

Quickies

4 **THE REGISTER**
Announcing the High Society Hot Line: (212) 370-1711

5 **SILVER SPOONFULS**
Candida's X-rated gossip; raunchy researcher; beach bunnies

10 **TALK TO ME**
Gloria answers her males

Fact and Fiction

12 **INTERVIEW WITH BJORN BORG**
The world's greatest tennis player talks about sports and sex

16 **PASSION IN PARADISE**
December's Reader Fantasy with a sultry, shocking she-male!

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Test your Sexuality Quotient

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Al Goldstein and Gloria Leonard, together—nude—at last

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Young and almost innocent

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By Marlene Willoughby

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By Pleasure Aims

26 **TEN INCHES**
By Ron Jeremy

27 **HARDCORE**
By Seka

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D.M.B. 2/11/85

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Edmund Fountaine
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Arnold Held
Production Director

Louis Montesano
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STRIP POKER

Dear Readers,

Shit, I sure am one lucky broad! A little over five years ago, I took a chance and shot my load, so to speak, on publishing what many thought would be just "another girlie" magazine. It's risky to be risque and to expect acceptance—let alone success—but I hit the jackpot and it's you, our *High Society* readers, I have to thank for backing us up. Yet, even after years of publishing experience, it's hard to be sure which particular element is the key to our winning popularity.

Could it be the most magnificent looking ladies in the world, such as this issue's Vanessa del Rio, Annie Ample and all the rest? Or maybe it's the on-going uncoverage of famous foxes and celebrities like Goldie Hawn and a host of others. Could it be the uniqueness of our racy records such as this month's premier performance by Annie Ample as she waxes wickedly over your spindle? Perhaps it's our interviews with the sensational and the celebrated, like this issue's controversial conversation with tennis star Bjorn Borg. Of course, I like to think that my input—whether in word, deed or picture—also tends to titillate. This month, along with *Screw*'s streamlined Al Goldstein, we bring you a campy, carnal look at some of the greatest(?) lovers in history.

A *High Society* survey indicated that my "Talk To Me" column is a favorite feature, and in keeping with our commitment to maintain open lines of communication, I'm excited to announce that you can now *really* talk to me on our newly installed Hot Line number: (212) 370-1711. When you call, I'll personally tell you what's happening and what's up and cumming in *High Society*, then you can talk to me, giving me your own comments, criticisms or suggestions. Keep it brief, though (you'll have about ten seconds to speak), and as a matter of practicality, try to keep it clean. After all, it is *your* dime! And I'm sorry, but as you can appreciate, we cannot return any calls.

Betting on life is the name of the game and, thanks to you, we've become the odds-on favorite with the nooky bookie! So be prepared as we up your ante and deal you a pat hand of December's *High Society*. It's down and dirty, yet fun and flirty. I'll open with a pair. . . .

Love and lust,

Gloria Leonard

Gloria Leonard
Publisher

SAVAGE LUST

Erotic Fiction By Russel Smith

Jackson took off with the money for the Virgin Islands to find a new identity, a new life. But his past came back to haunt him in the person of Margo Boland, a determined blonde who wanted only one thing from him.

"SAVAGE LUST"

Erotic Fiction by Russel Smith

Jackson Conrad was the day bartender at Malcom Cunningham's joint for two years, missing only two days work and late on a single occasion when the taxi in which he was speeding to work crashed into a stalled bread truck.

Unlike average bartenders, Jackson had a special smile for all the girls and—as they say in the ginmill business—a tin ear, meaning he could arbitrate any bar argument with exquisite grace. He listened to his customers' monotonous dreams of success and weekly catastrophies like a priest hearing confessions. Jackson never forgot a face and remembered one man's poison from another's with astonishing accuracy.

At the end of his day Jackson dutifully counted the cash and fixed the "bank" for the night man before bagging the take and dropping it off at the Second National's night vault on the way to his hotel. For two years, day in and day out, Cunningham's cash register jingled merrily and business maintained a daily average that made the owner's heart glow. Jackson Conrad's absolute dependability never failed to impress everyone in the ginmill business. A steady bartender who didn't cheat somewhere along the line or drink up the profits was as rare as a bronze tiddlywink.

Then, one Friday, no Jackson Conrad! The regulars fretted and speculated on the stoop next door while waiting for Jackson to open up. After two hours, Cunningham was telephoned the bad news. He hurried over. The kind of calm associated with impending disaster settled over the silent bar like an evil fog. When that longest day had ended, Jackson still hadn't appeared. Neither had he called. Cunningham dispatched one of the regulars to Jackson's hotel, only to find that Jackson Conrad had checked out!

The weekend dragged. It wasn't until the following Monday, with Cunningham himself behind the stick, that he decided to call the bank. The neighborly bank officer jokingly reported that the bank's very foundations were quaking since Cunningham's last withdrawals.

"What withdrawals?" Cunningham suddenly felt weak in the knees.

Jackson had forged withdrawal slips for all three of the bar's working accounts. The details were enough to drive even Cunningham to drink. Jackson had literally wiped him out!

* * *

The Carousel Bar on the island of St. Thomas in the U.S. Virgins is a nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup. Isolated in a barrio section of Frenchtown, the Carousel is a symbol of tropical decadence and moral decay that puzzles as much as it delights. It attracts a breed of first-class cruise ship tourists and crew who find the cheap and gaudy atmosphere exquisitely quaint and the artificial desperation of the derelict clientele amusing. It's the last place on the face of the planet anyone searching for the fugitive Jackson Conrad would look.

It was by sheer coincidence that Margo Boland, once one of Cunningham's prettiest customers and well known to Jackson for her ritualistic consumption of Bombay gin, sailed the cruise ship "Song of Norway" into the harbor of St. Thomas exactly two months to the day after Jackson's masterful coup. Keeping a date with a nice man she had met on board who said he knew of a quaint native bar with a mandolin player and tasty fried chicken, the Fates collided and Margo ran into Jackson. She was familiar with every detail of Jackson's coup and secretly admired him for it. A more brilliantly executed maneuver, one of stealth, consummate cunning, boldness and utter courage, existed only in fiction.

As Margo observed Jackson from the deepening shadows, his green mirrored glasses reflecting the existing light, she felt an unquenchable surge in her loins. He was puffing easily on a thin cigarillo and wearing a stunning white tropical suit and native straw hat of green bamboo. She suddenly felt an unscratchable itch bubbling behind her pink nipples. Margo couldn't believe her eyes. The incredible churning sensation of wild excitement in the pit of her stomach intensified as she stared at Jackson.

"What is wrong, dear Margo?" her companion asked.

She shook her beautiful blonde head. "Oh, nothing. Nothing, really." Margo smiled her sweetest smile. "It's nothing, Charles. I just suddenly feel like being alone." She touched his shoulder. "You wouldn't mind terribly, would you, Charles? It's just one of those nostalgic things that girls go through."

Charles was noble, and after being reassured with a firm squeeze on his semi-erect penis that she could find her way back to the ship, he whispered, "Margo, I'll see you back on board. I do understand, dear. Come to me for a nightcap. Cabin 904."

Changing her table for a less conspicuous one in the shadows, Margo reflected on Jackson's scam. An hour passed and she let herself be picked up by a U.S. Coast Guard officer, from whom she learned the current news and rumors about Jackson. He was now known as Jack O'Connor. He was extremely rich, and upon his arrival had bought the Carousel for cash. He visited it from time to time to check on the bartender and the till. He owned a house on the sea, kept three native servants and read a great deal. He was a loner, made no fresh friends and kept few acquaintances other than those to whom he paid local business graft. Everyone familiar with Mr. O'Connor believed he had done hard time in some foreign jail and was now on parole, minding his own business in an agreeable way.

As the officer went on about himself, Margo let him nibble her lips, kiss her eyes, use his tongue and feel her ripe breasts. At the same time, she didn't discourage his hand from stealing up under her skirt to finger her moist pussy. Her hunger for Jackson was becoming so fierce, so intense, that she broke out in a cold sweat. Margo had always craved Jackson's superb body, a savage lust.

"Are you all right?" the Coast Guard asked. He was alarmed and pulled his hand from between her bare thighs as if it were burning.

Margo rubbed sensuously against his shoulder. She used her soft stare. "Yes," she purred, brushing her lips over his. "Yes, but don't stop. Put your nice fingers back where they were. Touch my pussy. It's all wet. But tell me more about that mysterious man."

Suddenly her glance flew to Jackson and a wild shiver swept over her like an eight-foot tidal wave. He was staring at her! Jackson took off his mirrored glasses and squinted. He recognized her!

He pushed his way rudely through the natives jiving on the dance floor. Margo came as close to fainting as she'd ever remembered. Every pore was oozing blood. Her mouth flew open, her eyes zoomed in and out of focus. She caught her breath in fear as his bulk loomed closer.

There was no escape. Oh God! Blinded by reality, Margo suddenly saw Jackson as the young Orson Welles —chin slanted, eyes piercing, his tongue moistening his lips. With a gentle clearing of his throat and that thin smile from behind dark, leaden eyes, he sat next to her.

* * *

Jackson's house was down by a secluded crescent beach, where his yacht, the "Bally-hoo," swayed at anchor in the light Atlantic breeze. The landing dock was simmering in the tropical heat when Margo surfaced into consciousness.

She was naked except for her high heels. As she struggled to clear her brain, she discovered she was chained to a mattress spring. The raw metal was cutting into her flesh. Able to raise her head slightly, she saw a criss-cross pattern of pink welts lacing her thighs which were spread obscenely by the chains locked to her ankles.

Soon she realized she way lying on a cement patio facing the ocean. The tide was lapping gently, a lone gull crying in the distance. She could still taste whatever it was Jackson had drugged her with back at the table. Margo strained and tugged with all her strength. The hot sun blasted the unsheltered portion of the patio and boiled the breezes that fanned her nakedness. She wondered suddenly if she'd been raped. Unable to stretch her neck high enough to search between her thighs, she moved the muscles in her pussy, but they responded with no intelligent signal.

Drifting in and out of consciousness, she recalled Jackson's first words—how politely he had dismissed the Coast Guard lieutenant, how eagerly she had accepted his invitation for a drink. "Margo, for old times' sake," he had said. "We'll have no comment about this coincidence, right? But I am pleased to see you again, despite the circumstances. You are still so beautiful, so sexy!"

She clung to him. "Many people missed you terribly, Jackson. You were part of our lives."

Margo was unafraid, secure she could cope. How many hundreds of times had she sat opposite this handsome man at Cunningham's bar? For two years she'd been served by Jackson Conrad. She could not recall a single time when he'd been anything but kind and polite, tender with a compassionate understanding. He had always greeted her with piercing but friendly dark eyes —eyes she secretly directed to caress her breasts, to seek indecencies on her body, to linger on her bare arms,

to caress her fingers and her exposed thighs when her slit skirt would open and ride up. When Margo used the ladies room and wiped her moist pussy, she would imagine Jackson's beautiful eyes on her naked pussy lips, penetrating as deeply as she wished his cock would. Once, when her period struck in the bar, Jackson provided an emergency tampon. The intimacy impressed her.

Margo could never count the number of soft afternoons alone with Jackson when she had fantasized about him asking her to fuck his cock at the end of the bar, to suck him off down on his knees begging to lick her aroused pussy in the ladies' room as she sat on the toilet vulgarly peeing. Of course, it had never happened. Many a lonely night Margo masturbated her clitoris while imagining the iron beauty of Jackson's cock, his magnificent body, his hot lips on her stiff nipples, his long fingers stroking, squeezing, splitting her luscious buttocks wide, his tongue in her asshole.

She must have been awake now for more than an hour. She began to call his name, softly at first, then with increasing urgency until finally she was screaming at the top of her lungs. She sobbed in and out of scattered dreams. As dusk settled on the Caribbean, her body began to ache. The raw steel springs were lacerating her skin. Margo's delicate wrists and ankles were numb from struggling and twisting, her left wrist severely swollen.

Night came and Margo was cruelly awakened by a bright burst of light flooding the patio. Her screams careened and ricocheted in the darkness like lazer beams. She tried to relax, urine flooding out of her. Suddenly thirsty, her lips were dry and cracking. Would no one come to help? She began babbling, humming nonsense tunes.

It grew late and Margo was asleep again when she felt her wrists and ankles being released. Then, in the

darkness, she felt her aching, tormented body being lifted and carried through a doorway. The icy blast of air conditioning made her shudder.

Now she was being washed with scented oils by a naked black girl. A younger girl watched without smiling. A tall black man, a giant, with an enormous erection, fondled himself absently as he stood at the foot of her bed, the white of his eyes like that of his teeth and the sheets.

"Tell me where I am. *Please.* Where is Jackson? Please help me. I can pay, I beg you!"

No one spoke. The stone-faced black girl was now kneeling, pushing Margo's knees up and licking tentatively between her open thighs. Her red tongue explored Margo's pussy. Margo tried to raise herself to soothe her inflamed wrists, but the black man slapped her face. The younger girl was now rubbing oil over Margo's breasts, massaging them lasciviously, pinching her nipples and slapping her breasts with her open hand.

The black man stood. He climbed onto the bed to straddle his thick hairy thighs around Margo's head. He whispered to her to open her mouth. Margo surrendered. Wordlessly, he guided his heavy black weapon between her lips. Margo sucked and flashed her tongue, her eyes closed. "Open your eyes, bitch!" he said.

Flexing her fingers and toes, Margo spread her legs wider as the girl on her knees sucked and chewed her pussy lips. When Margo felt the first tickling in her clitoris, she began to squirm. She tried to pinch her hot nipples, but the black pushed her hands away. His glistening cock slid silently in and out of her wet mouth, her head rising and falling as she slurped and gulped him.

When she felt the black's cock begin to pulsate and sensed it was on the verge of ejaculation, she reached for

it. Her fingers curled around the slippery wet rod. Her other hand grabbed greedily for his sweating balls. She squeezed and manipulated them until she felt the lunge that signaled explosion. His cock leaped and flooded her mouth with raw cum. At the same instant, Margo felt her own orgasm scream as the girl's tongue and teeth and fingers mauled her throbbing pussy.

When the black pulled his cock out, the girls rolled Margo over on her belly. One anointed her wounds while the other brazenly fingered her anus after spreading her thighs wide. Margo could feel any number of thick fingers probing deep into her bowel.

"Please," she moaned. "Oh God! Please help me! Where is Jackson? I'll do anything he wants. Anything!"

She realized she was being blindfolded. A sharp stinging sensation in her right buttock followed a vicious slap. A needle, what else? This time she didn't want to resist. Total surrender, humiliation. Suddenly Margo felt as if she were floating, a combination of bizarre sensations like drifting, sinking, then flying.

A different penis penetrated her asshole with one solid thrust. Margo could feel female hands supporting her middle and the beginning of the ass-fuck she'd always dreamed of. The pounding of the thick cock into her sucking anus brought animal grunts and low whimpering, then crazy hysterical shrieks of delight!

Margo's brain was reeling. She could hear herself muttering obscene words, encouraging her fucker. With each violent thrust of the new cock, her body shifted higher and higher on the bed until she was pushed almost off it, supporting herself with her hands on the floor. When she began humping feverishly back on the cock and felt the terrible churning in her pussy that scrambled her senses, the spasm of her orgasm and the involuntary convulsions in her crazy pussy set her brain ablaze.

"Oh my God! My God, oh my God, fuck my ass!" she cried over and over. "God yes, fuck me, Jackson! Oh my God, fuck my ass!"

* * *

The "Song of Norway" customarily sounds two earth-shattering, ear-splitting blasts as it announces its departure. Before she sails from the dock and all the hawsers are undone, the deep-throated horn gives three mighty blasts.

In Cabin 203, first-class on the starboard side of the gleaming white vessel, Margo Boland lay naked on her bed. When she awoke, she had no idea where she was, but as the ship's great engines began to rumble she realized she was on her way to the next tourist port. She sighed and tried to relax. Lighting a cigarette, her eyes caught sight of a bouquet of flowers and a wicker basket of tropical fruit near the cabin door. Her heart leaped! Flying across the cabin, her fingers fumbled as she read the card: "Love from Charles. I've flown back to N.Y."

Throwing on her robe, her heart pounding, she rushed out on deck. She saw him, Jackson Conrad, standing near the West Indies Company shed, with the cigarillo, the hat, the white suit and the green mirrored glasses. Margo waved frantically, yelling his name.

Jackson brought an admonishing index finger up to his lips and motioned it like a school teacher. Margo saw his familiar bar grin and could almost hear the warning "shsssh" as he turned his back and dissolved into the pier shadows.

APPENDIX F

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER A. SAMAD and S & H MANAGEMENT CORPORATION,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

REPORTER'S TRANSCRIPT
TRIAL

August 12, 1985, and August 13, 1985

Before:

THE HONORABLE ALMERIC L. CHRISTIAN,
Chief Judge

Appearances:

ETHEL CARR HUNTER MITCHELL, ESQ.
and
GERALD DENNENBERG, ESQ.
Attorneys for the Plaintiffs

CAMPBELL & ARELLANO
By: JOSEPH BRUCE WM. ARELLANO, ESQ.
Attorneys for the Defendants

* * * *

[301] THEREUPON, GLORIA LEONARD, being first duly sworn, was examnied and testified as follows:

DIRECT EXAMINATION

BY MS. MITCHELL:

Q Please state your name.

A My name is Gloria Leonard.

Q What is your occupation, Miss Leonard?

A I am the publisher of High Society Magazine.

Q How long have you been in the business of publishing?

A A little over nine years.

* * * *

[310] BY MS. MITCHELL:

Q Now Miss Leonard, you told me you had lived in Puerto Rico at one time; is that correct?

A That's correct.

Q When was that, approximately?

A Approximately from 1968 to 1970.

Q And when you were living in Puerto Rico, did you have occasion to come to St. Thomas?

A On a number of occasions, yes.

Q And when you came to St. Thomas; did you go on the waterfront?

A Yes.

Q And would say say each time you came, you generally went on the waterfront?

A I think it's practically an impossible task to come to St. Thomas and avoid the waterfront.

THE COURT: So, you would say that each time—

THE WITNESS: Yes.

THE COURT: All right.

BY MS. MITCHELL:

Q And do you remember any particular [311] places or stores or establishments, from your own personal knowledge, of having visited St. Thomas?

A Yes, I do.

Q What places in particular?

A Lion in the Sun, the Riveria Boutique, Sparky's.

Q When you say "Sparky's, do you mean the restaurant Sparky's?

A No, the liquor store.

I recall an establishment on the waterfront, Sebastian's, which doesn't seem to be here any longer.

Q I think in your deposition you indicated to me that you had eaten at Sparky's. Do you remember that?

A I may have. I have been here a number of times, and running in for a quick bite, it's possible. I don't remember distinctively, no.

Q After 1970, after you moved from Puerto Rico, did you come back to St. Thomas?

A I have a few times.

Q And do you have any idea—I think you indicated in the deposition that you came back [312] once or twice a year. Would that be an approximate amount?

A Since 1979, I think I have been here, including these two most recent trips, maybe six times since 1970.

Q When you returned, would you also generally walk on the waterfront?

A Yes.

Q Do you recall seeing the Carousel Bar?

A Never.

Q You never remember seeing the sign?

A Never saw it, never heard of it.

Q Okay. Now you remembered Sparky's, or you remember Palm Passage and you remember Lion in the Sun.

Do you remember if there were cruise ships in the harbor?

A I don't recall ever having physically seen them, although by evidence of all the people in the stores shop-

ping where I was shopping, I was aware of the fact that there were in the vicinity. But I don't recall seeing them.

* * * *

[342] BY MS. MITCHELL:

Q Did you get a representation from Russel Smith that this was fiction?

A Yes, we did.

Q Did you get the representation that there was no place called the Carousel Bar?

A That there was no place called the Carousel Bar?

Q In St. Thomas.

A That is almost sort of redundant, getting a representation from Russel Smith that it was fiction—

* * * *

[254*] BY MR. ARELLANO:

Q Do you know Mr. Russel Smith?

A Yes.

Q What is the extent of your contact with him?

A Russel Smith is a long-standing writer, primarily in the area of erotica and what is [255] considered, again, for the men's sophisticated magazine market. He has written thousands and thousands of stories such as "Savage Lust," and the story speaks for itself.

Q To your knowledge, has he ever written any novels?

A Yes, he has.

* * * *

[257] BY MR. ARELLANO:

Q The purchase—was a purchase order form tendered to Mr. Smith in July when he submitted "Savage Lust"?

A There was one made out on his behalf to generate the payment schedule and make it applicable to the appropriate issue.

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* The procedure in the District Court of the Virgin Islands is to begin each new day's transcript with page #1, thus pages 254-307 are from a new day's session with the witness Gloria Leonard.

MR. ARELLANO: May the witness be shown the purchase order form, please?

THE COURT: Yes. Mrs. Jackson, please.

THE CLERK: I'll be right there, Judge.

BY MR. ARELLANO:

Q Down at the bottom of that purchase order form there is some writing, correct?

A Correct.

Q And there are some warranties and representations made by the seller to the purchaser?

A That is accurate.

Q The seller would be who?

A The seller in this case would be Russel Smith.

[258] Q And High Society was the purchaser?

A Correct.

Q Amongst the warranties and representations made there, is there a representation that the story does not infringe on anyone's rights?

A Absolutely.

Q Okay. Did High Society rely on that representation by the seller?

A Absolutely.

MS. MITCHELL: Objection, your Honor. There is nothing to say that Russel Smith signed that. It is not signed.

THE COURT: It is not signed?

THE WITNESS: If I may—

THE COURT: Hold on.

MS. MITCHELL: It is not signed.

THE COURT: It is not signed by Russel Smith?

MS. MITCHELL: No.

THE COURT: I am not asking you. I am asking the gentleman.

MR. ARELLANO: No, sir.

[259] THE COURT: Well, then, you can't ask her that.

BY MR. ARELLANO:

Q Miss Leonard, what is the standard operating procedure of High Society with respect to purchase order forms?

Do you get the signature of the sellers on this?

THE COURT: Whether they do or whether they do not, unless you prove that Mr. Smith signed one of those, I will not accept any testimony to say that he conformed to anything that is in it. All right?

MR. ARELLANO: Let me try this another way, Judge.

THE COURT: All right.

BY MR. ARELLANO:

Q You testified that Mr. Smith worked for Feelings, Inc., between September '80 and January '81.

A Yes.

Q You testified that he issued many of those purchase order forms during that five or six [260] months period.

A Correct.

Q Did he—

THE COURT: She did not testify, as you put it, that he issued—

MR. ARELLANO: Yes, she did.

THE COURT: I understood the witness to say that she assumed he would have had to have done it, not that she specifically remembers that he did it, which you are asking now. But go ahead.

MR. ARELLANO: Thank you.

BY MR. ARELLANO:

Q Did Mr. Smith know what High Society's understanding was with respect to purchase order forms?

MS. MITCHELL: Objection, your Honor.

THE COURT: I sustain the objection. I am not going to accept in this case the contents of that purchase order to show what Mr. Smith knew about this, not by any proof of this sort. To me, that is so elementary we

shouldn't even be wasting time back and forth with it. [261] MR. ARELLANO: May I inquire as to High Society's understanding of the transaction, then?

THE COURT: Oh, what High Society felt, certainly. She is fully competent to tell us that.

BY MR. ARELLANO:

Q Did the check accompany that purchase order form?

A Yes.

THE COURT: Did what?

MR. ARELLANO: The check.

THE COURT: The check for $200.00.

MR. ARELLANO: Correct.

THE WITNESS: Yes.

BY MR. ARELLANO:

Q The check for $200.00 accompanied that.

A It is commonly the practice in publishing, particularly in stories, half is usually paid upon acceptance, the other half on publication.

Q Was that check endorsed and cashed by Mr. Smith? [262] A Yes, it was.

Q What was High Society's understanding with respect to the cashing and endorsing of that check by Mr. Smith?

MS. MITCHELL: Objection, your Honor.

THE COURT: If the witness is going to say any more than her understanding was that, having cashed the $200.00, the canceled check came back to her, I sustain the objection. I don't want her to say it is her understanding, once he received that check he knew and understood what terms and conditions; that is what she is forbidden to say. I admire persistence in a lawyer, but there should be an end to it.

BY MR. ARELLANO:

Q Miss Leonard, did—to the best of your knowledge, did Russel Smith ever live in St. Thomas?

A Not to my knowledge.

Q Did he ever visit St. Thomas, to your knowledge?

A I don't know.

Q With respect to the pictorial [263] illustration that precedes the story, "Savage Lust," I ask you to turn to it, please.

A (Witness complies with request.)

Q Now then, was that drawing drawn by Russel Smith?

A No, it was not.

Q Who was it drawn by, to the best of your knowledge?

A By Penelope Enterprises.

Q What was Penelope's relationship to High Society?

A It is an enterprise artist which does, for a number of magazines, freelance illustrations to accompany fiction, as well as nonfiction.

Q Were they commissioned by High Society?

A By my art department, yes.

Q Was the same person running the art department who ran the editorial department to whom the story was submitted by Russel Smith?

A It is two different entities; it is run by different people.

Q To the best of your knowledge, did [264] Mr. Smith ever communicate or every—did he ever communicate or talk to Penelope Enterprises?

A No.

MS. MITCHELL: Objection.

THE WITNESS: Yes, I do know that.

THE COURT: Just a minute. The question was to the best of her knowledge, did he ever. The answer is yes. And how did you acquire that knowledge—

MR. ARELLANO: Your Honor, the answer was no, not yes.

THE COURT: I was assuming she said yes. You asked her, to the best of her knowledge, did Mr. Smith and Penelope—

MR. ARELLANO: Did Mr. Smith ever communicate to Penelope, and—

THE COURT: Her answer is no.

MR. ARELLANO: Her answer is no.

BY MR. ARELLANO:

Q Miss Leonard, did you read the story, "Savage Lust"?

A A number of times.

Q Did you read it prior to its [265] publication?

A Yes, I did.

Q Was there anything in the story that alerted you to anything being amiss or defamatory of a person in there?

A Nothing whatsoever.

Q Did you at any time have any indication that the story referred to or was intended to refer to a real person?

A There was no indication of that. It was some of Russel's better work, I thought.

Q What is High Society's—strike that.

Do you know what the word "vetting" means?

A I do now.

Q What does the word "vetting" mean, please?

A To the best of my understanding, vetting is the practice wherein an attempt is made to research the accurate or the verification of facts in material that asserts certain factual information. It attempts to vouch for and validate either the facts or statistics.

[266] Q Vetting is done in connection with what type of works?

A Nonfiction.

Q Are you familiar with other publications in New York, of magazines that are similar to High Society?

A Yes, a number of them.

Q Can you name them, please?

A Gallery, Swank, Genesis, Hustler, Penthouse.

Q Do most of the magazines publish fiction?

A Most of them do.

Q Do you know or have personal knowledge of any of the editors or publishers of any of those magazines?

A Yes, I do.

Q Are there any guidelines, either written or formal guidelines that establish whether there are any procedures or any obligations on publishers of such magazines with respect to the vetting of fiction?

A Well, if I may, the term "vetting of [267] fiction" is a contradiction of terms, in that you can't vet fiction, because there are no facts.

MS. MITCHELL: Objection. Will you direct the witness to answer the question?

THE COURT: All right.

MS. MITCHELL: I don't think she is being responsive.

THE COURT: Mr. Rodriquez, please read the question aloud for my benefit and for the witness, please.

(The reporter read the record as requested.)

THE COURT: Please answer yes or no.

THE WITNESS: There are no official guidelines.

BY MR. ARELLANO:

Q In your opinion as a publisher, is it possible to vet fiction?

A It is not.

Q Why is that?

A By the very nature of the term "fiction," it would be not only physically [268] impossible, but logistically impossible to nail down, as it were, every single element in a fictional work.

For example, if I may, given this particular situation, if we would have to check to see where there was a Margo Boland that ever used the Song of Norway in Room 2 or 3, we would have to check to see if any bar owners of any establishments on this island ever wore white suits or wore green sunglasses, without going on

and on, it would be both economically infeasible and not possible.

Q If you were to embark on a diligent investigation of this story, would you think it a prudent thing to investigate what bars are located in isolated barrios—

MS. MITCHELL: Your Honor, I would like to object. She did not investigate—

THE COURT: I can't hear your.

MS. MITCHELL: I do not think that the hypothetical is proper. She said she does not investigate, and she doesn't think that she should.

* * * *

[276] BY MR. ARELLANO:

Q Do you ever publish fictional stories, or have you ever published fictional stories dealing with cities in other parts of the world?

A Yes.

Q Other than the United States?

A Absolutely.

Q Can you state for the record what some of the cities are that have been referred to in other stories of fiction?

A Saigon, Rome, Milan, Australias, Rio de Janeiro; those are the ones I can recall.

Q Having sat in the courtroom the last two days and having heard the testimony from the plaintiff's case, do you believe, sitting here now, that the story "Savage Lust" was intended to refer to Yassir Samad?

MS. MITCHELL: Objection.

THE COURT: What is the objection?

MS. MITCHELL: It calls for a legal conclusion.

THE COURT: No, no; that's one of [277] the factual matters in the case.

MS. MITCHELL: Not her opinion of it, I don't think.

THE COURT: Well, it is going to be a very bias opinion, but I will accept it.

Surprise me. You may answer the question.

THE WITNESS: I can only surprise you with my honesty. I do not.

THE COURT: That doesn't surprise me. You are not a lawyer.

MR. ARELLANO: With the Court's indulgence.

(Pause.)

BY MR. ARELLANO:

Q In your opinion, Miss Leonard, is the story, "Savage Lust," about anyone?

A No.

MR. ARELLANO: Thank you.

[296] Q Isn't it true that another reason you felt it wasn't necessary to check out the facts was because of the disclaimer at the front of the magazine?

THE COURT: Because of what?

MS. MITCHELL: The disclaimer at the front of the magazine.

THE WITNESS: That certainly alerts people to the fact that the fiction in the magazine bears no similarity to anyone living or dead.

BY MS. MITCHELL:

Q What is the size of the typeset that High Society uses for most of the printing of the magazine?

A It varies, twenty-four point, eighteen [297] point.

Q Can you tell me what the size of the typeset involving the disclaimer on page four is?

A I don't know off the top of my head; it is the standard of the industry.

Q Can you read that paragraph?

A I certainly can.

> "Any similarity between the people and places in fiction in this magazine and any real people and places is purely coincidental."

Q And that is on page what?

A That is on page four.

Q And what page is the story?

A The story, I believe, starts on page forty-four; forty-four.

Q So, you are admitting that in some instances you would do an investigation, if you recognize the name of a person; if it is Frank Sinatra or President Reagan, you would do an investigation?

A I would do more, or some. It would depend on the context in which it was used.

* * * *

[304] THE WITNESS: Perhaps it does, but in my particular journalism, it doesn't. When we issue a purchase order, our warranty, which implies that the material that the author is selling us that, our understanding is sufficient—

THE COURT: He is then undertaking to guarantee you that what you are buying from him is purely fictional and refers to no live person?

THE WITNESS: A certain amount of it is trust, yes.

THE COURT: I see this great tennis player, Bjorn Borg.

THE WITNESS: Bjorn Borg.

THE COURT: "His Frantic Effort." Didn't you get a release from him?

THE WITNESS: Yes, I am sure. He is a real person.

THE COURT: Exactly.

BY MR. ARELLANO:

Q Miss Leonard, hypothetical question: let's say you wanted to get a release prior to [305] releasing "Savage Lust." Who would you get a release from?

A Beats me.

Q If you had gotten a release from Mr. Samad, the plaintiff, now knowing what you now know today—

THE COURT: Would she have what?

MR. ARELLANO: If she had gotten a release from Mr. Samad.

BY MR. ARELLANO:

Q —knowing now what you know now today in the courtroom, would that have completely protected you?

MS. MITCHELL: Objection.

THE COURT: There you are getting into a legal thing that might be on a bar exam. Not being a lawyer, it's a hard question.

BY MR. ARELLANO:

Q Did you hear testimony today that some of the facts and circumstances of Mr. Tallman's life coincide or are similar to the facts chat appeared in the story, "Savage Lust"?

A Again, this is hypothetical, if I [306] assumed it was about someone, I would assume it is Tallman.

THE COURT: Don't keep that up.

BY MR. ARELLANO:

Q Assuming Mr. Samad would not have protected you from a lawsuit from Mr. Tallman?

A That is correct.

Q Did you hear the testimony with respect to the Vitelco phone book, that there was a John Connor?

A Yes.

Q The name of the fictional character is Jackson Conrad; that is what he changes his name to; is that right?

MS. MITCHELL: I object. He has gone way beyond cross examination.

MR. ARELLANO: These are hypotheticals, your Honor; they are related to the hypothetical. Mrs. Mitchell said it is about them, and that presupposes that it is about Yassir Samad, and what I am suggesting to the Court—

THE COURT: Don't presuppose anything; when it is a hypothetical, it doesn't [307] presuppose.

MR. ARELLANO: For the purposes of the hypothetical.

THE COURT: It is simpler to let you ask the question. I don't see how it helps the case.

BY MR. ARELLANO:

Q You heard testimony that there was a John Conrad in St. Thomas in the telephone book of 1981; isn't that right?

A Yes.

Q So that the release from Mr. Samad would not have—

THE COURT: Why do you ask a question like that? It seems to me when you are having a trial, you ask witnesses questions to bring out information that would be helpful to the Court. To have this witness tell me that a release from John doesn't protect you from Paul is to tell me nothing. I know that, the whole world knows that. What is the point in these questions?

* * * *

APPENDIX G

UNITED STATES DISTRICT COURT
IN THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 82-26

JABER SAMAD and S & H MANAGEMENT,
Plaintiffs,

—against—

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

Deposition of Defendant HIGH SOCIETY MAGAZINE by IRA KIRSCHENBAUM, held at the offices of Abelman, Frayne, Rezac & Schwab, Esqs., 708 Third Avenue, New York, New York, on the 11th day of February, 1985, at 10:15 o'clock a.m., pursuant to Notice, before Douglas M. Burke, RPR, a Notary Public of the State of New York.

* * * *

[4] Q. What year was it started?

A. 1966, I believe.

MR. BEIER: 1976.

A. 1976.

Q. Did you receive any on the job training in your position?

A. No.

Q. Were you in the military?

A. No.

Q. Do you have any criminal record?

A. No.

Q. Would you describe your job and its responsibilities?

A. I am vice president of the magazine and basically I am in charge of all administrative, financial and general operations of the business.

Q. We requested certain documents to be produced. Do you have the original article, Savage Lust?

A. No, I don't.

* * * *

[27] Q. No internal memos or anything?

A. No.

Q. Have you ever been to St. Thomas?

A. I Believe I have.

Q. Have you ever been on the waterfront of St. Thomas?

A. Yes.

Q. Did you know that the cruise ship the SONG OF NORWAY regularly stops in St. Thomas?

A. No.

Q. Did you know if there was a restaurant by the name of the Carousel Bar in St. Thomas?

A. No.

Q. Did anyone in your organization know that there was a bar by the name of the Carousel in St. Thomas?

A. I can't answer for the other people. I have no idea.

Q. Do you know if there was any investigation as to whether there was a place by the name of the Carousel Bar?

A. I can't tell you that.

* * * *

[31] Q. Do you know if Russell Smith submitted the illustration also?

A. No, I believe not.

Q. How would the illustration have been created?

A. Through our art department. The editorial would say they have a story on a bar in the tropics and they would ask for an illustration relating to that.

Q. Then someone, one of your employees would do that?

A. No, not an employee. An outside illustrator would be called in and told what we wanted.

Q. Do you inquire of the illustrator if they have ever been to St. Thomas?

A. I had no dealings. I wouldn't know.

Q. So you wouldn't know if they had ever been to St. Thomas?

A. No idea.

Q. Would you know if they had ever been to a bar named the Carousel?

A. Definitely.

[32] Q. They would not speak with the—

A. No. The article will have been submitted to our office and the illustration will have been assigned by the art department, which is totally different from the editorial department.

Q. If Russell Smith was working in the office—

A. He was not working when this story was done.

Q. But in July 1981, was Russell Smith still working in the office?

A. I don't know. I would have to check.

MS. MITCHELL: Mr. Beier, could you ask Ms. Leonard to bring some sort of documentation as to when Russell Smith left?

MR. BEIER: Ms. Leonard is not usually at the office and she would not have access to the files.

MS. MITCHELL: Would you have whoever in the office would have access bring them, please?

MR. BEIER: We will check. We will let you know.

* * * *

[75] Q. So you don't go behind the author?

A. Not generally. Not unless the story doesn't seem to be what it is.

Q. You say you knew that you had personally seen aircraft carriers in St. Thomas?

A. One aircraft carrier.

Q. How long did you stay in St. Thomas when you were there?

A. About eight hours.

Q. You came on a cruise ship?

A. QE 2.

Q. It wasn't the SONG OF NORWAY?

A. No.

Q. Was the SONG OF NORWAY in that day?

A. I don't believe there were any other ships in. The QE 2 doesn't dock there. It stays in the harbor.

(Discussion off the record.)

Q. When you were in St. Thomas, did you walk the waterfront?

A. Yes.

Q. What year was that you were there?

A. About five years ago, 1980.

[76] Q. Around 1980?

A. '80 or '81. I know it was July, though, my birthday.

Q. Did you know Russell Smith then?

A. I think so.

Q. Did you meet him in St. Thomas?

A. No, I met him in our office.

Q. But you personally do not remember a place called the Carousel?

A. No.

Q. Do you remember any restaurants on the waterfront?

A. No.

Q. Any bars on the waterfront?

A. No.

Q. Do you remember any places selling French fried chicken drenched in catsup?

A. No. I remember a leather store at the end of the dock that had fancy leather goods.

Q. Are there any written policy guidelines for the magazine?

A. No.

Q. Were there any in 1981?

A. No.

* * * *

[78] Q. What magazines have you been involved with in terms of publishing, or the financial sides of what magazines?

A. High Society and other magazines published by Drake and its related companies.

Q. Can you name what other magazines are published by Drake that you have been involved with?

A. Feelings, Private Letters, Life, Sappy, Magic Magazine, Muscle Training Illustrated. That is about it, I guess.

Q. Do any of those magazines or any magazines you have worked for have any written guidelines as to investigative policies?

A. No.

Q. No procedures?

A. No.

Q. Who would you consider to be the competitor magazines to High Society Magazine?

A. Hustler, Club, Cheri, Velvet, and a bunch of others that are smaller.

Q. Have you ever had any discussions with them as to any guidelines for investigations?

[79] A. No.

Q. Are you aware of any procedures that they might have for investigation?

A. No.

Q. Do you know if anyone in your organization is aware of any guidelines they have for investigation?

A. No.

Q. Are you aware of any standard procedure in the field for investigating?

A. No.

Q. Is there any informal group of persons that meet on a regular or irregular basis from these maagzines?

A. Not that I know of.

Q. Have you ever discussed with any persons from other magaiznes any libel or defamation lawsuits?

MR. BEIER: I don't think that is relevant. I direct the witness not to answer.

Q. Have you ever discussed any situations or contracts relative to Russell Smith with any of the persons in these other organizations?

A. No.

[80] Q. Do you know if Russell Smith has written any articles that have been published by any magazines other than your companies?

A. No.

Q. You don't know?

A. I don't know.

Q. Do you have any idea where Russell Smith is now?

A. No.

(Recess taken.)

Q. It would be fair to say, then, that there was no one on the staff whose primary responsibility was to investigate the accuracy of your fictional stories?

A. Correct.

Q. Would it be fair to say that there was no one who was charged with that as a part and parcel of their responsibility to investigate this?

A. Correct on fictional, yes.

Q. As a general procedure in your business, you relied on the warranty of the authors; is that correct?

A. Generally yes.

Q. As far as this particular story goes [81] and your knowledge of the story, you relied on Russell Smith's warranty?

A. Yes.

Q. No additional investigation was done, as far as you know?

A. Correct.

Q. Do you know if any expenditure of any kind of funds for even just a long distance call was ever made?

A. I don't believe so.

Q. Do you know if in any of your competitor magazines there are any persons charged with the responsibility of investigating the truth or accuracy?

A. I have no knowledge.

Q. At Simon & Schuster in the fiction department, do you know if they had anyone charged with the responsibility of investigating?

A. I don't believe they did.

Q. In any organizations that you have worked for?

A. No.

* * * *

[84] Q. You have testified that Exhibits 1 and 2 were related; is that correct?

A. That is the purchase order and the checks, right.

Q. Mr. Smith, did you get a copy of the purchase order?

A. Yes, he gets the original copy.

Q. This statement at the bottom of Exhibit 1, "publication will not infringe upon any [85] copyright, privacy, propriety or any other right of any individual or entity," that appears at the bottom?

A. Correct.

Q. Did High Society rely on that?

A. Yes.

Q. That was a representation from Mr. Smith to you, was it not, to High Society?

A. Correct.

Q. I want to go back to Exhibit 3, which is the magazine, go back to the illustration. Do you see a picture of a boat in that illustration?

A. Yes.

Q. On page —

A. 45.

Q. Does it say the name of the boat on that illustration?

A. No.

Q. Did the illustrator who drew that illustration received a copy of the story Savage Lust?

A. I would believe not.

Q. So the illustrator then was not aware of the contents of the story?

[86] A. No.

Q. When she drew the illustration?

A. No. * * * *

APPENDIX H

UNITED STATES DISTRICT COURT
IN THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 82-26

JABER SAMAD and S & H MANAGEMENT,
Plaintiffs,

—against—

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

Deposition of LAWRENCE E. LEVINE, held at the offices of Abelman Frayne Rezac & Schwab, Esqs., 708 Third Avenue, New York, New York, on the 14th day of June, 1985, at 10:01 o'clock a.m., pursuant to Notice, before Andrew L. Pustay, a Notary Public of the State of New York.

* * * * *

[3] LAWRENCE E. LEVINE, having been previously sworn, resumed the stand and testified further as follows:

EXAMINATION BY MR. BEIER:

Q. You have just testified in a discovery deposition but this is a completely separate deposition for purposes of introduction as trial testimony and accordingly I will have to go back over some of the material you covered previously, starting with your name, address and background, and just to save time, I would appreciate if you would do it in narrative form and give us the information.

A. My name is Lawrence E. Levine. I reside at 505 East 79th Street, New York, New York 10021.

Giving you my professional background chronologicly, I graduated from Harvard Law School in 1956, and was a teaching fellow at Harvard in 1957.

I then became an associate of a firm entitled Bartels & Hartung, and was there for approximately two years. [4] When the firm dissolved, upon the appointment of John R. Bartels as a United States District Court judge for the Eastern District of New York, I joined Judge Bartels as his law clerk and served for a three year term.

Thereafter, I was associated with the firm of Busby & Rivkin, and in 1966 became a member of the legal department of Stanley Warner Corporation.

In 1968, I believe, Stanley Warner mergerd into Glen Alden Corporation, and I was an Associate General Attorney, I believe the title was, at Glen Alden Corporation.

In 1973 I left Glen Alden and took a position with Downe Communications Inc. as general counsel and later vice president and general counsel.

Downe Communications subsequently merged into a subsidiary of the Charter Company, and the name of the new entity was Chartcom, Inc.

I remained with Chartcom Inc. until 1983, when I became General Counsel to a partnership entitled TV Cable Week, which published a magazine by the same name. [5] TV Cable Week was a subsidiary of Time Incorporated, and upon suspension of publication, I became a member of the Time Incorporated magazine law group with the title of Associate Counsel.

I am currently employed in that position.

Q. During the 10 years that you were with Downe Communications and then known as Chartcom Inc., did you have editorial review responsibilities and for what publications?

A. I had editorial review responsibilities for all of the publications of Downe and Chartcom during the 10 year period, with the exception of approximately two years,

during which another attorney who reported to me assumed responsibility for editorial review.

The publications owned by Downe and Chartcom from time to time consisted of American Home, Family Weekly, Discount Merchandiser, Sport Magazine, Ladies Home Journal and Redbook.

Q. Of those magazines, which published nonfiction and which both?

A. All of the magazines published [6] nonfiction. None published fiction exclusively.

Redbook and Ladies Home Journal both published fiction as well as nonfiction.

MS. MITCHELL: May I voir dire the witness at this time, please?

VOIR DIRE EXAMINATION

BY MS. MITCHELL:

Q. Mr. Levine, attorney Levine, you indicated that some of the magazines published fiction.

Did you review any of the fiction?

A. Yes.

Q. Can you tell me what you reviewed and on what occasions?

A. I reviewed fiction if it were specifically brought to my attention by an editor with a request for such review.

Nonfiction came to me in the regular course of business and was reviewed. Fiction was not reviewed in the normal course of business.

Q. During your tenure, how many times were you asked to review or did you have occasion to review fiction?

A. I was asked on one occasion to review a [7] novella that was to be published in Ladies Home Journal.

Q. And that is the only time throughout your career in these publications that you were asked to review a piece of fiction?

A. That was the only time the editors felt there was a story that merited legal review.

Q. Would it be correct to say that that was the only time that you did in fact review a piece of fiction?

A. Correct.

MS. MITCHELL: I would like to enter an objection at this point. I don't think, for the record, that he is, at least on the basis of this testimony, competent to enter an opinion as an expert as to standards in this particular case because we are dealing with fiction, and I would object to him testifying as an expert on the basis that he is not an expert.

* * * *

[9] Q. Are you familiar with the expression vetting, V E T T I N G?

A. Yes.

Q. What does that mean?

A. Basically it refers to the procedure whereby an article is subject to scrutiny in order to determine whether there is substantiation for statements made within the piece.

Q. Would that be synonymous with what you have been discussing in terms of review or does review encompass something more?

A. That is essentially what I have been discussing in terms of editorial review.

The function of the attorney in the editorial review is twofold.

One, it is to review the article to ascertain if there are any areas which might be deemed defamatory, and the second aspect is to [10] call upon the contact who may be a researcher, it may be a editor, and it may be, in certain instances, a writer, in order to ascertain what substantiation exists for the statements that are made in the article.

Q. How often was Ladies Home Journal and Redbook published?

A. They are both monthly publications.

Q. Would I assume correctly then that there are a considerable number of fiction articles published over the course of years in these two magazines?

A. That's correct.

Q. So that your failure to review or vet the fiction articles is not because they did not—

MS. MITCHELL: Objection, I think you are leading the witness, and I would ask you to rephrase your questions. I think they are leading.

Q. Was your failure to review or vet fiction articles of these two magazines—why don't you tell us in your own words?

A. Well, the essential reason for not reviewing fiction is the difference between fiction and nonfiction.

[11] In reviewing nonfiction, one is able to look at words and determine whether or not they carry a potential defamatory connotation and one is then able to seek verification for those statements.

And at this point let me interject by "seeking verification", I am not talking about an independent going forth and undertaking an investigative procedure, but it is a procedure of culling that material which has been submitted in order to substantiate whether it is sufficient and accurate.

In addition, when one deals with nonfiction, one is able to deal with a clearly defined person or entity that may be defamed.

In dealing with fiction, on the other hand, what one has to do is start with something that is false, look at it and say if it were true, would it be susceptible of a defamatory meaning if it were not true, which is a bit of mental gymnastics, which is not particularly easy to perform.

Moreover, one does not have any ability to seek substantiation of nonfact, which would be [12] the subject or purpose of vetting fiction.

The object is to ascertain that there is no fact and there is no way in which one can prove the absence of a fact.

Lastly, since almost every writer will draw upon his own experience, people he knows, places he has been to, things he has observed or become familiar with, whether or not a work of fiction involves any real people is a matter which lies primarily within the mind of the writer, and this is not subject to any form of review.

At best, it would be a confrontation between the attorney and the writer in order to have the attorney render his opinion as to the credibility of the writer's denials, which is hardly a legal function capable of clear definition.

Q. Would you tell us your professional associations and your familiarity with the writings and case law on a general basis in the field of defamation?

A. I am a member of the American Bar Association. I am a member of the Association of the Bar of City of New York. I am a member of the Magazine Publishers Association legal committee.

[13] In the course of some 13 years of undertaking editorial review, I have become familiar with case law dealing in the field of defamation.

At the MPA legal committee current cases are reviewed at our monthly meetings, and within the magazine law group at Time, there are by-monthly meetings and developments in the case law are discussed if there is something unique or new.

In the course of my practice for a number of years I have read the media law reports which are issued approximately weekly, and try to also see if there is any prominently featured case in the New York Law Journal dealing with the field of defamation as well as other areas related to publishing.

Q. The practice of not reviewing fiction, is that a practice unique to yourself or would you say it is a general practice in the publishing field?

A. I can't say whether it is a general practice. I do know that since my departure from Chartcom, Redbook is now published by the Hearst [14] Corporation, and the attorney at Hearst has told me that fiction is not reviewed.

MS. MITCHELL: Objection. I think that is hearsay, but I just enter the objection.

A. I have similarly been advised that fiction is not reviewed at Ladies Home Journal, which is now owned by Family Media Corporation, and it is—that is the extent to which I can comment with regard to the general practice within the industry as a whole.

At Hearst no fiction is reviewed other than, again, at the specific request of a editor.

Q. Do you have any connection with the defendant High Society or High Society Magazine?

A. No, I do not.

Q. I show you Plaintiff's Exhibit 3 for identification in the case, which was the December 1981 issue of High Society Magazine, and ask you if you have ever seen that magazine as a totality before?

A. No, I have not.

Q. Would you examine the table of contents, particularly with respect to page 44, and tell us what that says?

[15] A. Page 44, in the table of contents, lists a story entitled "Savage Lust," the subtitle is "Sex in the South Seas, fiction by Russell Smith."

Q. Is this called the editorial page?

A. Basically this would be referred to as the masthead.

Q. The masthead, and tell us whether you see any disclaimers on that page with respect to similarity with persons?

A. There is a statement in the masthead, "any similarity between the people and places in the fiction in this magazine and any real place, people and places is purely coincidental."

Q. Turning to page 44, would you read the title of the story?

A. The title actually appears on page 45, since there is a spread covering pages 44 and 45. The title is "Savage Lust." The sub underneath that, erotic fiction by Russell Smith."

Underneath that a statement that "Jackson took off with the money from the Virgin Islands to find a new identity, a new life, but his past came back to haunt him in the person of Margo Boland, a determined blond who wanted only [16] one thing from him."

Q. By the way, would you say that the drawing of a woman on the page is a blond?

A. It is a redhead.

Q. Would you examine the story itself and tell us whether that is the story which you have previously read in typed up form separate and apart from the magazine?

A. Yes, it is. Yes, it is.

Q. Now, if this story had been submitted to you labeled erotic fiction and described as such by the author, would you have reviewed it?

A. The procedures under which I have operated on were that no fiction would be submitted to me other than by specific request.

In the normal course of editorial procedures in the companies with which I have been affiliated, the story would not have come to me unless someone specifically asked me to look at it.

Q. If somebody had asked you to look at it, would you have made any inquiry whether the drawing of the woman represented a real person?

A. As a general procedure, artwork would not be reviewed, and I would not have inquired if [17] the drawing represented a real person since the drawing itself is a picture of either a nude or partly nude, one cannot tell totally from the picture, certainly nude from the waist up, person.

The features are features that one would expect in almost any type of drawing of someone trying to draw an attractive woman.

The nose is what I would describe as a classic plastic surgeon's nose. Bodies are bodies.

Q. Hypothetically, if you were the attorney for High Society Magazine, and the publisher, who is Miss Leonard, came to you with the story and said here is a story from Russell Smith. He says it is erotic fiction. What would you have done?

A. If I were asked to review it, I would have read the story, and if she just said to me this is a story, it is erotic fiction, I would have passed it unless I was asked to look at it.

Q. Would you have picked up the phone and called St. Thomas?

A. No. The story upon reading deals with certain names of people that are not particularly subject to any form of verification.

* * * *

[29] Q. Let me understand this.

Are you saying that in your opinion, as long as it is fiction, there is no duty to investigate? Is that the crux of your testimony?

A. The only time I believe a duty lies to review fiction is where the fiction is a thinly disguised masking of a clearly identifiable individual that would be almost—

Q. Or business?

A. Or business that would be universally identifiable. For example, the novella that I was asked to review was a book called Dolores written by Jacqueline Susann.

It was a story of a woman who had a sister. They were of a socially prominent but impecunious family whose father was a well known roue, whose childhood was affected by the poverty [30] despite the social prominence, who married a young politician, had two children, an older girl and a younger boy.

He was elected senator, became president of the United States, and was assassinated.

The character Dolores found that the bulk of the estate was in trust for the children, and that once again she was without financial security, came to New York to try and establish a basis to operate some means of earning a livelihood, had a relationship with the son of a prominent family, fell deeply in love, only to be confronted by the fact that his current status harkened back to her prior status, namely the family was socially prominent, but had no funds, and she could not face the probability of a life without the security she had always sought, and as a result succumbed to the blandishments of a wealthy Greek millionaire and married him.

I don't think there is any person in the United States that could not believe this was a story about Jacqueline Bouvier Kennedy Onassis, and therefore, there was a feeling that the public [31] might think that this was a thinly disguised unauthorized biography, and therefore, it became something subject to be reviewed.

But in general, writers write about people and places that they are familiar with.

When the recent telecast was made of The Sun Also Rises, there was an article, I think it was in Life Magazine, which pointed out the various people in Hemingway's circle who found themselves as characters in The Sun Also Rises.

F. Scott Fitzgerald wrote a thinly disguised version about his life with his wife and their problems. Tennessee Williams plays were based on Tennessee Williams' childhood and family.

Every writer is going to do that. There is no way for a lawyer to get into the writer's mind in order to ascertain what in the fiction is based upon realities and what is not.

* * * *

[33] I cannot answer the question in terms of the profession as a whole.

Among the people that I know who are involved in the area of defamation, legal review of fiction is rarely undertaken because of the essential inability to verify fact, which is the purpose of the legal review in the first place.

Q. In the area of nonfiction, where there is review, where there is what you call vetting, in your experience, in your organization, for example, how many persons would be employed or are employed, let's be specific, in Time Incorporated to do investigation or to do what you call vetting the articles?

A. I can't answer the question. I don't know how many people are employed. Time, Inc. is a unique company in that since its origins were in writing news in Time, Time Incorporated, adopted a policy of maintaining a very substantial research staff.

* * * *

APPENDIX I

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER A. SAMAD and
S & H MANAGEMENT CORPORATION,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and
RUSSELL SMITH,
Defendants.

REPORTER'S TRANSCRIPT

TRIAL

August 13, 1985

BEFORE:

THE HONORABLE ALMERIC L. CHRISTIAN,
Chief Judge

APPEARANCES:

ETHEL CARR HUNTER MITCHELL, ESQ.
and
GERALD DENNENBERG, ESQ.
Attorneys for the Plaintiffs

CAMPBELL & ARELLANO
By: JOSEPH BRUCE WM. ARELLANO, ESQ.
Attorney for the Defendants

* * * *

[185] MR. ARELLANO: The defense calls John Tallman to the stand as the next witness.

THEREUPON, JOHN C. TALLMAN, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ARELLANO:

Q Good morning, Mr. Tallman. Would you please state your full name for the record?

A John C. Tallman.

Q Where do you reside, sir?

A I live at 4-45 Estate Harmony.

Q What was your connection to the bar, Carousel?

A I owned and operated the bar—or not the bar, but the Carousel Restaurant from 1965 to 1980.

Q You say you live at 4-4 Harmony?

A Four dash Forty-five.

Q Four dash Forty-five.

Can you give the Court a physical [186] description of where the premises are?

A The house is—

MS. MITCHELL: Objection.

THE COURT: I overrule the objection.

MR. ARELLANO: I'm sorry?

THE COURT: I overrule the objection.

We would get on much faster: do you live on a beach?

THE WITNESS: Yes, sir.

THE COURT: Then describe it.

BY MR. ARELLANO:

Q Can you describe the beach, please?

A Actually, it is two beaches. The house is on a slight promontory between a crescent beach and a half-moon beach in Estate Harmony.

Q Would you characterize the beaches as being crowded?

How would you characterize the beaches?

A Definitely not crowded, because an estate road, it is a private road that approaches, [187] and it is in very bad shape, so it doesn't invite traffic. And also, it's jungled, behind where I live is all jungle.

Q You say you live in a house; is that right?

A That is correct.

Q Do you own the house?

A Yes, I do.

Q And are there any other houses on either of the two beaches?

A There is one house at the far end of the crescent beach.

Q How about with respect to the other beach?

A The other beach, no dwellings.

Q Sir, what is your educational background, please?

A I have a B.S. degree in biology, graduate of the Infantry School, Fort Bennings.

Q Did you serve in the Armed Forces?

A Yes.

Q What period of time?

THE COURT: Are you sure this is [188] relevant to the case?

MR. ARELLANO: Yes, sir.

THE COURT: It is interesting, but are you sure it is relevant?

MR. ARELLANO: Yes, sir; trust me.

THE COURT: All right.

THE WITNESS: Active service from '41, right after Pearl Harbor, until the end of the war in 1945.

BY MR. ARELLANO:

Q In what branch of the Armed Services were you serving?

A The Air Force.

Q Did you see any combat?

A Yes.

Q Where was that?

MS. MITCHELL: Objection.

THE COURT: Counsel said it is relevant, and he will tie it in later.

Isn't that what you said?

MR. ARELLANO: Yes.

THE WITNESS: In the European operation.

[189] Q What happened as a result of the last combat you were in?

A The last mission, I was shot down.

Q What happened then?

A I was incarcerated in a German prisoner of war camp.

Q How long?

A Fourteen months.

Q When did you get out of the prisoner of war camp?

A In May 1945.

Q How long were you there, all told?

THE COURT: Fourteen months.

BY MR. ARELLANO:

Q Okay, directing your attention—when did you move to St. Thomas, please?

A In 1964.

Q Between 1945 and 1964, what country were you living in?

A In the U.S.

Q And what jobs or occupations did you have in that approximately twenty year period?

A From 1945 until 1964, I was operating [190] restaurants and supper clubs in the western United States.

Q How many different restaurants or supper clubs did you operate?

A About fifteen.

Q In what states, please?

A In California, Nevada, Idaho.

Q When you moved to St. Thomas in 1964, what was your financial condition, sir?

A I was secure. I had just recently sold a bar in Las Vegas, and an apartment house.

Q And when did you purchase the Carousel?

A In 1965.

Q Okay. Did you take out any loan to purchase the Carousel?

A No, I didn't.

Q Have you ever served drinks yourself, as a bartender?

A Yes.

Q Do you consider yourself—do you consider yourself a good bartender?

A Well experienced, many years of it.

[191] Q And what does being a good bartender imply, or entail?

A Naturally, he has to be cognizant of his customers' needs, wants.

Q Do you—did you find that you remembered customers' drinks, what particular repeat customers drink?

A Yes; that is part of being a good bartender.

Q Did you find yourself arbitrating arguments between customers?

A That is a constant situation in a bar.

Q Now then, at some point in time you sold the Carousel to the Plaintiff, Yassir Samad?

A That is correct.

Q When was that, please?

A That was in January 1980.

Q And what were the terms and conditions of that sale, please?

A The terms were based on two notes of $44,000.00 each. Yassir didn't have cash, so we made it possible for him to operate by making monthly payments on the two $44,000.00 notes.

* * * *

[199] Q And is Frenchtown divided into sections and neighborhoods?

A No; Frenchtown is rather a compact, homogenic group.

Q Does Frenchtown have the same ambience and atmosphere that the waterfront does?

A Definitely not; it has a flavor of its own.

Q Would you describe the difference, please?

MS. MITCHELL: Objection, your Honor. I think it is irrelevant.

THE COURT: I overrule the objection.

THE WITNESS: The waterfront and downtown Charlotte Amalie is a bustling trade center, tourist oriented. Frenchtown would be the antithesis, almost the opposite. It is a small place. It is frequented almost entirely by locals.

* * * *

[207] THE COURT: It is on the table before you.

BY MR. ARELLANO:

Q I would ask you to look at pages forty-four and forty-five. Do you see that illustration?

A Forty-four, forty-five; that's the girl; right.

Q I ask you to look at the scene from that picture, and tell me whether there is anything that is particularly characteristics or indicative only of St. Thomas.

A It would be difficult to identify it for any one place; definitely not the waterfront.

Q Why do you say it is definitely not the waterfront?

A Well, looking straight out in the picture, it looks like open sea. And looking out from the waterfront, you don't have an uninterrupted view of the sea. The two parcels of land that show in the picture are unidentifiable of anything that you see from the waterfront.

* * * *

[210] Q Do you remember having lunch with me?

A Yes, I do.

Q Where did we have lunch?

A In Frenchtown, at Quarter Deck.

Q And what did we do after we finished lunch at Quarter Deck?

A We went to the Clarosel Bar [phonetic].

Q And what happened—please describe to the Court where the Clarosel Bar is located

MS. MITCHELL: Objection.

THE COURT: What, Clarosel?

MS. MITCHELL: I don't think it is relevant at all.

MR. ARELLANO: Your Honor, the story "Savage Lust" is a story of fiction. Our position is it could have been written of anybody—

THE COURT: Just a second. I will overrule the objection, and hear the witness.

MR. ARELLANO: Thank you.

THE COURT: You are welcome.

[211] BY MR. ARELLANO:

Q Where is the Clarosel located?

THE COURT: Spell that word for me.

MR. ARELLANO: Shall Mr. Tallman spell it?

THE COURT: No, you; the name of the bar.

MR. ARELLANO: I'm not positive. I think it is C-l—

THE COURT: I want to be sure I heard an "l" sound after the "C."

MR. ARELLANO: All right.

BY MR. ARELLANO:

Q Where is the Clarosel located?

A It is on the western Main Street, beyond the Catholic Church.

Q How would you describe the neighborhood where the bar is located?

A Rather depressed, run-down.

Q What happened immediately, or one moment after our entrance into the Clarosel Bar?

MS. MITCHELL: Objection, your Honor. I do not see the relevance of what happened to [212] Mr. Arellano and Mr. Tallman in 1985.

THE COURT: I will let him testify, so I will know how to respond to the proposition, which I am sure I will get it.

Go ahead and answer the question.

THE WITNESS: Immediately after we entered, we sat down at the bar and were approached by two girls.

THE COURT: That's it.

MS. MITCHELL: Your Honor, I will ask that it be stricken, your Honor.

THE COURT: Don't you understand? He is trying to show that this is another bar in St. Thomas about which a story could be written.

MS. MITCHELL: In 1985, your Honor.

THE COURT: Well, you can argue—you can ask him whether it was there in 1980, 1981, whatever. I am not going to stop him from testifying. That is why I told you in advance, I let the testimony to hear how they responded to the proposition, because I knew it was coming.

So, you were approached by two girls.

THE WITNESS: That is correct.

[213] THE COURT: Then what happened?

BY MR. ARELLANO:

Q Did you engage in a conversation with a woman who approached you?

A Yes, I did.

Q Did you, during the course of conversation, have occasion to ask her where she was from?

A Yes. She told me she was from Martinque.

Q Did she proposition you, sir?

A Yes; it was her profession.

THE COURT: How was she dressed?

THE WITNESS: The one—the girl that was talking to me was dressed, she was in a dress.

THE COURT: Was either one half-naked?

THE WITNESS: No, they were not. They were fully dressed.

THE COURT: That is all I wanted to know. Thank you.

* * * *

[216] BY MR. ARELLANO:

Q Were you able to observe how the chicken was served, how the fried chicken was served?

A It was served with a disk with catsup and french fries.

Q How long has the Clarosel Bar—strike that.

Do you remember the Clarosel Bar going back to 1980, 1981?

A Yes, it was, or is.

THE COURT: Just a second; I don't understand the answer. Please ask the question again.

MR. ARELLANO: My question was unclear.

BY MR. ARELLANO:

Q Do you remember the Clarosel Bar from 1981?

A Clarosel, yes, I do.

THE COURT: I take it from that, you are saying that to your knowledge a bar called Clarosel existed where the one presently is, as far [217] back as 1980 and 1981.

THE WITNESS: Yes; because I had personal interest because of the conflict of names. The name would keep coming up, and I wondered if there was a similarity in the connection, and I looked into it to see that it was spelled differently.

THE COURT: Very well; thank you.

BY MR. ARELLANO:

Q Do you know whether the Carousel Restaurant, when it was owned by Mr. Samad, whether it served fried chicken?

A The first year, I don't recall him selling any food. That was one of the concerns of mine.

• • • •

[225] Q Mr. Tallman, you have had—have you had an opportunity to read the story, "Savage Lust"?

A Yes, I did.

Q And in your opinion, does the story have to do with Yassir, or did it have to do with Yassir Samad?

A No, sir.

MS. MITCHELL: Objection.

THE COURT: He has already answered the question.

[226] BY MR. ARELLANO:

Q In your opinion, is the story about you, or does it have to do with you?

A No, it didn't.

Q Do you accept at face value the subtitle of the work, that it is erotic fiction? Do you accept that representation on face value?

A You mean the description of the story?

Q Yes, being one of fiction.

A Yes, of course.

Q Mr. Tallman, do you own a white suit?

A Yes, I do.

Q Do you own sunglasses?

A Yes, I do.

Q What color are they?

A I have several colors. I have gray, smokey amber, green.

Q Thank you. Do you have any hats?

A Yes.

Q What color?

A The only hats I have now are work hats, caps, and I have a collection of coconut hats that I use when I am out in the sun a lot, or out on [227] a boat.

Q Did you have any green bamboo hat in '80?

A They all are green in the collection.

THE COURT: He asked about bamboo.
THE WITNESS: It is coconut.
THE COURT: He only asked about bamboo.
THE WITNESS: I have never seen a bamboo.
THE COURT: Nor I.

BY MR. ARELLANO:

Q. Mr. Tallman, you were present in the courtroom yesterday, were you not, when there was testimony that—from June Querrard, that the trade name Carousel was in the Hagen House until March of 1982?

A Yes.

* * * *

[228] BY MR. ARELLANO:

Q What is your relation to Hagen House?

A President of the corporation.

[229] Q Were you principal shareholder?

A Yes.

Q Were you so in 1981?

A Yes.

* * * *

[231] Q Mr. Tallman, you testified that—you testified that you had been to the Clarosel Bar; is that correct?

A That is correct.

Q Has the Clarosel Bar changed since 1980, if you know?

A From the first time I checked it because of the similarity of names, no, I can't see any difference.

* * * *

APPENDIX J

UNITED STATES DISTRICT COURT
IN THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 82-26

JABER SAMAD and S & H MANAGEMENT,
Plaintiffs,

—against—

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

Deposition of Defendant, RUSSELL SMITH, held at the offices of Abelman Frayne Rezac & Schwab, Esqs., 708 Third Avenue, New York, New York, on the 31st day of July, 1985, at 10:00 o'clock a.m., pursuant to Notice, before Andrew L. Pustay, a Notary Public of the State of New York.

* * * *

[5] Q. That is how he did business.

Would you tell me your complete name?

A. Russell Smith.

Q. Have you ever been known by any other name?

A. No.

Q. Do you use—

A. There is an exception.

MR. BEIER: I would like to note for the record, S&H, the plaintiff, is the corporation that owned the restaurant and bar, the name of which is in dispute.

THE WITNESS: In dispute.

MR. BEIER: Note for the record that Mr. Arellano has just joined this deposition by telephone and will participate on a speaker phone, both listening to the deposition and perhaps asking questions when it comes up.

BY MS. MITCHELL:

Q. Mr. Smith, I have asked had you ever been known by any other name?

A. Writing I have been known by several names. William Riordan, Robin Moore, Bruno Rossi, Frank Scarpatta, and that is about it. And I. [6] Smithson.

Q. How do you spell the last?

A. Which one?

Q. I. Smithson.

A. S M I T H S O N.

Q. What is your address?

A. 124 MacDougal Street, New York City, 12.

Q. How long have you been living there?

A. Seven years.

Q. Are you employed currently?

A. No.

Q. Where were you born?

A. Philadelphia, Pennsylvania, December 22.

Q. Do you mind telling us the year?

A. 1922.

Q. Would you give us your educational background?

A. Rutgers University.

Q. Did you get a degree?

A. No.

Q. Did you specialize in a particular area?

A. None.

Q. Have you received any other training?

A. Yes, University of Rome in Italy, [7] University of Chicago.

Q. What types of courses did you take?

A. These were audited courses.

Q. What was the subject matter of the courses?

A. I suppose psychology. I can't think of a better name.

Q. Now, what is your occupation?

A. Fiction writer.

Q. How long have you been a fiction writer?

A. Since I was 25. I am now 63.

Q. That is approximately 38 years, yes.

What types of things do you write?

A. You name it. I have written about everything, from politics—I was a freelancer for a senator.

Q. What senator was that?

A. He wrote Taft-Hartley years ago.

I have been a journalist for various newspapers. I have written articles, 250 articles. That is without exaggeration.

That is rather stunning to look at the amount of work I have done. I have written many short stories like this one that we are dealing [8] with here. Poetry, nonfiction. I am what you call a hack, a man who writes anything for money.

Q. And in the years 1980, 1981, 1979, who were you working for at that time?

A. I don't really know. I wasn't working for anyone. What I really did, I took one job in my life. That was with High Society, the magazine we are talking about.

Q. When did you start working with High Society?

A. I don't know. I was an editor. I don't really have the dates of when I did it. It was only for six months and they wouldn't give me a raise. So I left.

Q. If I told you that High Society produced for us copies of checks that they had paid to you from the time—

A. What was the first one?

Q. September 5, 1980?

A. Okay. Let's see if I have that.

Q. Does that sound approximately correct?

A. I guess so if that is when they said it.

* * * *

[37] THE WITNESS: I don't know about him. Anyway, I had an interlude with Jackson Burke at the 55 Bar. That took place on the same day, July 8, 1981.

In the bar, there was a story about a bartender who had run away with a lot of money from this bar years before. It was talked about. His name was Johnny Romero.

He went to a place in Paris, he went to Paris and blew all the money. That is the end of that story.

Q. All that you read is true?

A. That is true. Now, on July 9, which is the next day, I finally reached Pat Reshen, editor of High Society. She was refreshingly pleasant and confidential on the phone. We talked shop for a few moments and she asked me for fiction, 10 to 12 pages, very hot.

She called me sweetie, my love and dear. [38] That is in quotes. I thought that was sweet.

MR. BEIER: You were not in anyway connected with High Society at that time?

THE WITNESS: No, I wasn't. That is on the 9th.

On the Saturday, July 11th, several days later, at 1330 in the afternoon, I went to work. Work on High Society story and Chel has not phoned. Sickens me in the gut. Chel has not—I mean work on High Society story.

This is the story that began like this.

This is my exact record of the story.

* * * *

[43] Q. We will call that Exhibit 6.

A. This is all right, right?

MR. BEIER: Sure.

A. Number 6 is the retype, which I typed up for number 1. That is number 6.

(Whereupon, document above referred to was marked as Plaintiffs' Exhibit 6 for identification, as of this date.)

A. Quote, only one flaw equals one transition could be sharper, with a pause. That is a paragraph. But the

whole piece weighs well and is fast. Tight with effective double O'Henry ending, with sufficient sex and suspense. We will see what Pat Reshen thinks. End of quote.

That is this. This is the carbon copy of the original story.

[48] A. The Song of Norway is in the story. The ship is leaving at the very end.

You know, it is hard to describe what a fiction writer goes through, and I don't know I can recall anything that would lead me to say why I put the story in St. Thomas or in the Carousel. To deal in maybes, maybe it was this, maybe it was that. I know that when I was down there and I saw the Carousel, it was no longer like it had been. It didn't resemble anything that I wrote in the story.

It wasn't—when I placed it in the barrio in Frenchtown, I know it was in Frenchtown when I actually wrote the story. I know there is no two Carousels. He told me this when I was down there just in May, for some reason, but it seemed to me that Jackson Conrad wouldn't have run that kind of a stinky, out of the way French whore type bar, the Martinque type, in Frenchtown, not the Carousel Bar that I knew of.

Q. Because you knew the Carousel was on the waterfront, in real life, the real Carousel [49] was on the waterfront?

MR. BEIER: Which one, Rocky's?

A. It was on the waterfront, it was a lovely joint. The one that Samad had wasn't lovely at all. It was just a bar that collected not even—it collected mostly sailors at night, but that was it. It wasn't sordid or dirty. It was just a ordinary, neat little bar, not at all like the bar I had here. That is like—up in the hills in St. Thomas there is a bar like this.

Q. Oh, yes?

A. I forget its name. It is Margarita's or something way up in the hills.

Q. Driftwood?

A. Something like that, and there are people sitting around like whores and old bodies. Very seldom did people go up there. In '67, '68 we went up there a lot. That is the bar.

Q. Why did you choose to call it the Carousel?

A. Because the Carousel was in my mind. It sounded like a name. I always had trouble spelling the word Carousel all my life. I don't know why that is.

[50] Q. Had you ever been given any advice about libel law?

A. I knew nothing about libel law. When I wrote the story, that is the last thing I ever considered. I had no intent or aim to libel anybody, especially him. I couldn't imagine how I could libel him, Samad.

Q. Well, let's go on.

The lady Marie?

A. Margo.

Q. Morrela, selected the story, accepted the story?

A. She took the story.

Q. What was your input after that, anything at all?

A. Nothing. I gave it to her and I said can I have the bill, you know. Because I know how these purchase orders are arranged. I went into Carmen, had her type it up, and then she must have done something with it.

Carmen West was her name. She took it and had it signed by Carl Ruderman and brought it back with a check for 200 and gave it to me.

Q. Is that your copy of the purchase order?

[51] A. That is my copy, yes.

MS. MITCHELL: If we can mark that as Exhibit 8.

(Whereupon, document above referred to was marked as Plaintiffs' Exhibit 8 for identification, as of this date.)

(Recess taken.)

BY MS. MITCHELL:

Q. Mr. Smith, you were about to tell me what happened after you submitted the article to High Society. What was the next thing?

A. The next thing was to get my money. Once you write an article for any girlie publication, you have to get your money real fast or they won't give it to you. They will let you know in 6-8 months. You say here is the story, give me the money. You have one hand for the money and one hand with the story. High Society was no different than anyone else. They let you go for it. I got 200, which I thought was good.

I said to Frank, call me up when he gets the next 200 so I know when it is coming. That is how I spent the time with Marie on the phone, with Frank downstairs, about the money. Ira has to [52] sign the checks and—

Q. Ira Kirschenbaum you are referring to?

A. Yes.

Q. He is the financial vice president for High Society.

A. And Ira won't sign any checks. Ira signs the checks and puts it in the bottom draw and you get it 40 months later.

MR. BEIER: Russell, we will have to sue you on behalf of Ira now, too.

THE WITNESS: Ira knows he does this. It is all right.

Q. What is the next contact you had with the story?

A. None. The next contact was getting the money as it says. The last item in the book, I got 200, and I waited for the next check and it is somewhere in the diary that I received the check for 200. That is it. I never saw the story either.

High Society never sends you the story when you are in it. They never send you a magazine when your story appears. You call up and call up, you look at every story that comes out in [53] the newsstands. Maybe it is in there or not. You give up on the story.

Then one day about a year later I picked up that copy of the magazine and there is my story.

So I read it. And I went back and I noticed in the story they cut out one paragraph of mine that is in here which doesn't make any difference.

That is it. Then I saw it, just as it says, and I heard nothing from anybody, and the story went the way all stories go. I must have published 3000 short stories in all the magazines in New York over the years and they come and they go.

Q. So did you have anything to do with the picture that preceded the story?

A. No.

Q. You didn't see it and you weren't consulted about it?

A. There is some story—wait.

What I'm thinking of is another story they did many months before that. I saw the picture. It was called "A Christmas Story."

* * * *

[81] Q. When Pat Reshen called you up in July [82] 1981 and asked you for stories, she was asking you for a work of fiction, is that correct?

A. That's correct, erotic fiction.

Q. And that is what you submitted?

A. Yes, sir, erotic fiction.

Q. And I believe you testified that you never saw the drawing or the article itself until about a year later?

A. That's right. Yes, that's right.

* * * *

APPENDIX K

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

DEFENDANT'S FIFTH SET OF INTERROGATORIES, REQUESTS FOR ADMISSIONS AND DEMAND FOR PRODUCTION OF DOCUMENTS

TO: Jaber A. Samad and
S & H Management Corp.
c/o Ethel C. H. Mitchell, Esq.
25A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands

Pursuant to Rules 33, 34 and 36 of the Federal Rules of Civil Procedure, the following Interrogatories, Requests for Admissions and Demand for Production of Documents are propounded by Defendant High Society in the above-captioned action to the Plaintiffs and are to be answered under oath within the time provided by said Rules.

INSTRUCTIONS

NOTE "M": All requests to admit pursuant to Rule 36, F.R.Civ.P. begin with the following phrase, typed in the following manner: "DO YOU ADMIT that . . . ."

* * * *

5A. DO YOU ADMIT THAT the "Carousel" was located on Waterfront Drive, in close proximity to Sparky's Waterfront Saloon, Bluebeard's Store, Kentucky Fried Chicken, and the former Arby's Restaurant.

* * * *

6A. DO YOU ADMIT THAT Jaber Samad and/or S & H Management Corp. purchased the "Carousel" or the Sublease for the "Carousel" with a $10,000 loan from Barclay's Bank and loan from one or more of his brothers.

* * * *

41A. DO YOU ADMIT THAT the "Carousel" had rock'n'roll bands and/or country/western bands for entertainment.

* * * *

46A. DO YOU ADMIT THAT the Carousel was

(a) located on the waterfront
(b) was *not* located in Frenchtown
(c) was *not* located in an isolated bario
(d) was *not* a symbol of tropical decadence
(e) was *not* a non-descript sailor's dive
(f) was *not* populated with half-naked Martinique whores
(g) was *not* an attraction to tourist because of a "cheap and gaudy" atmosphere or because of a derelict clientele

* * * *

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
Defendants.

ORDER

THIS MATTER came before the Court on Motion of Defendant High Society to deem admitted those demands for admissions contained in its Fifth Set of Interrogatories, Demand for Admissions and Demand for the Production of Documents (Fifth Set). The Defendant's Fifth Set having been served on Plaintiffs' counsel on or about May 13, 1985, and the Plaintiffs having failed, neglected and refused to answer or otherwise respond to said demands for admissions, and this Court having orally entered an Order on June 24, 1985 in open court deeming said requests to admit as contained in Defendant's Fifth Set as being admitted, and the premises considered it is hereby

ORDERED that the demands for admissions contained in Defendant's Fifth Set be and hereby are deemed admitted pursuant to F.R.Civ.P. 36 for purposes of this lawsuit.

Dated: August 6, 1985

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN,
Chief Judge

ATTEST:
GEOFFREY W. BARNARD
Clerk of the Court

by /s/ Frank Blackman

88-369

No. 88-

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DRAKE PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,

Petitioner,

v.

JABER A. SAMAD AND
S & H MANAGEMENT CORPORATION,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Supreme Court held in *Gertz v. Robert Welch* 418 U.S. 323 at 347

> "So long they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual."

This is exactly such a case. The District Court and the Third Circuit followed this Court's ruling. A private party was damaged by a false defamatory publication. No error was committed.

Respondent, S & H Management Corp., owned and operated the Carousel Bar on the island of St. Thomas, U.S. Virgin Islands when Petitioners, Drakes Publishers, Inc. d/b/a High Society Magazine published the story "Savage Lust" in its December, 1981 issue. The real Carousel Bar had been in existence for over twenty years and occupied a very prominent position on the waterfront. The real bar was popular with local people and tourists alike.

The Carousel Bar in "Savage Lust" was described as "a nondescript sailor's dive complete with half naked Martinique whores, cheap rum and fried chicken drenched in ketchup." The owner of the Carousel Bar drugs a girl, kidnaps her and forces her to submit to a night of sodomy and rape. (District Court Memorandum Opinion App. A at 9).

"Savage Lust" was a false, defamatory publication about a private party involving no issue of public concern. Over 400,000 copies were distributed throughout

the United States and the world. The bar was recognized by recipients who reasonably believed the story to be of and concerning the real Carousel Bar in St. Thomas.

The District Court, after a bench trial in which the publisher of High Society testified that she'd personally visited St. Thomas numerous times before publishing "Savage Lust," found that she knew of the existence of the real Carousel Bar when she published the offending publication.

The author of "Savage Lust," Russell Smith, knew of the real Carousel Bar for years before writing the story and had visited it less than two months before he wrote "Savage Lust." He'd asked for and been denied permission to write a story about the owner of the Bar. The publisher never got or even asked the author for a disclaimer that "Savage Lust" did not depict or portray a real person or place.

S & H Management Corp. the owner of the real Carousel Bar sued and was awarded judgment of Seventy Five Thousand ($75,000.00) Dollars in presumed damages.

The Third Circuit Court of Appeals after briefing and oral argument unanimously affirmed the judgment. The panel then denied the petition for rehearing en banc.

This petition for Writ of Certiorari should be denied because this case raises no conflict between the circuits that needs to be resolved; presents no question of federal statute or federal common law that requires resolving; and is a case involving a purely private plaintiff defamed

by an admittedly false and defamatory publication involving no matter of public concern.

OPINIONS

After a bench trial the District Court of the Virgin Islands issued its Memorandum Opinion on March 2, 1987 (Appendix C) Judgment was entered July 24, 1987. (Appendix D)

The United States Court of Appeals affirmed unanimously by Judgment Order issued April 29, 1988 (Appendix E). Petitioners request for rehearing en banc was denied May 31, 1988. (Appendix F)

JURISDICTION

Jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. 1254(1). The District Court of the Virgin Islands had general original jurisdiction of this matter pursuant to 48 U.S.C. 1612(1). Jurisdiction of the appeal vested in the United States Courts of Appeal for the Third Circuit pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

The December, 1981 issue of High Society Magazine featured a story about the Carousel Bar located in the Caribbean on the island of St. Thomas. It began with a

two page color picture of the waterfront of St. Thomas with a cruise ship in the background, behind a naked blonde girl. The story entitled "Savage Lust," called fiction, described the Carousel bar as a

> "nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup."

The owner drugs a young lady, kidnaps her and takes her to his condominium on the beach. When she awakens she is strapped to a mattress and left in the sun. After going in and out of a drugged stupor, she is forced to engage in cunnilingus and fellatio with the black servants of the owner of the Carousel Bar. She is then injected with a needle, given another drug, and is forced to submit to repeated acts of sodomy with the owner of the Carousel Bar. She awakens on the cruise ship, the "Song of Norway," as it leaves St. Thomas. (Appendix A – "Savage Lust")

Although the story was called "fiction" respondents proved that at the time when it was written, the author, Russell Smith, knew there was a *Real Carousel Bar on the waterfront of St. Thomas*. Smith had visited St. Thomas for many years and knew the Carousel bar very well. His wife had worked there. The bar had been in operation for *over 20 years* at the time that the story was written. Less than 2 months before he wrote the story, Russell Smith had been in St. Thomas and had been evicted from the Carousel Bar by the owner when he tried to get the owner involved in a sexual menage a trois with himself, his girlfriend and the owner. Smith had asked for permission to write about the owner of the Carousel Bar and had been denied. Two months later Smith went back to

New York, wrote "Savage Lust" about the Carousel Bar in St. Thomas, submitted it to High Society Magazine and had it published.

Respondents also proved that at the time when the publishers of High Society Magazine accepted and printed "Savage Lust," they also knew there was a Carousel Bar in St. Thomas. Gloria Leonard, the publisher, testified that she had lived in Puerto Rico in the 1960's (thirty miles from St. Thomas) and had visited St. Thomas many times. This was in the time when the Carousel Bar was in its "hey day." (Memorandum Opinion, App. B at 10) The Carousel Bar was right on the waterfront of St. Thomas. Gloria Leonard had walked the waterfront as had Ira Kirschenbaum, the vice president of High Society Magazine before they published the story. The Carousel Bar was a bar in the middle of the most heavily traveled section of St. Thomas. Part of it included open tables on the waterfront. It occupied a prominent position on the waterfront. At petitioner's insistence it was deemed an admitted fact that you couldn't walk the waterfront without having seen the Carousel Bar. (App. I at 31)

Ms. Leonard testified that she specifically remembered two stores on *both* sides of the Carousel Bar. Gloria Leonard never asked Russell Smith for a waiver or representation that "Savage Lust" did not depict real places. She knew the Carousel Bar existed when she published "Savage Lust."

In addition, the two page color illustration indroducing the story was a vivid depiction of the *actual view* from the Carousel Bar in St. Thomas. The picture showed the waterfront. It showed a cruise ship in a position where

the cruise ship, the Song of Norway would have been if you looked out from the real Carousel Bar.

There was also testimony from the vice president of the magazine through his deposition that High Society Magazine had a policy of getting disclaimers from their authors before publishing such stories, even fiction, but that in this instance they had not done so. On the basis of these facts the District Court found fault on the part of the publisher. The Court found that the petitioners acted with reckless disregard in publishing "Savage Lust" even if they didn't know there was a bar of the same name in existence. The Court also had the testimony of Gloria Leonard that she would have published "Savage Lust," even if she'd known there was a real Carousel Bar. (Testimony of Gloria Leonard at trial App. J at 36)

The District Court of the Virgin Islands followed very strictly the provisions of the Restatement of Torts, which is the law in the Virgin Islands in the absence of state statute, (Appendix G), in its Memorandum Opinion (Appendix B). (Restatement of Torts 558, 559, 561, 564 App. H) "Savage Lust" was false. It was defamatory. It was reasonably believed by recipients to have portrayed the respondents. It damaged the reputation of respondents and lowered the esteem with which its business was held in the community.

This is clearly a case involving a private person defamed by a publication, and exactly the kind of case that is properly within the state's jurisdiction to decide. This is not an appropriate case for decision by the Supreme Court. It is not a case of first impression. It is

strictly a case of a private person defamed by a publication involving no issue of public concern. There is no conflict among the circuits to be resolved. There is no issue of constitutional law that has to be resolved. Petitioners seek a license to defame. They seek to have the court ignore hundreds of cases involving the law of defamation. They published a false, filthy story, naming a real business, in a real city, visited by thousands and thousands of tourists every year. They used the actual name of the bar and a picture of the actual view. They knew it existed. They circulated over 400,000 copies of the magazine worldwide. People read the story, identified the real Carousel Bar with the one in the "Savage Lust." This is a clear case of defamation no more and no less.

ARGUMENT

1. This Is Not An Appropriate Case For Review By The Supreme Court.

There is no conflict among the circuits that needs to be resolved. Petitioners have not cited any conflicts in the circuits caused by this case. This case does not involve a Federal Statute or Federal Common Law. Again petitioners have not cited any federal statute or federal common law that was misinterpreted or misapplied.

This case is precisely the type of defamation case referred to in *Gertz* and *Dunn & Bradstreet* involving a private person, not involving any issue of public concern.

The United States Supreme Court in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974) held that in defamation cases where the plaintiff is a private person, the *States*

may define for themselves the appropriate standard of liability so long as they do not impose liability without fault. *Samad et. al. vs. Drakes Publishing Inc. d/b/a HIGH SOCIETY MAGAZINE* is such a case. The District Court of the Virgin Islands (acting as a finder of fact), following that mandate found *fault* on the part of High Society Magazine in publishing the article "Savage Lust." It found that High Society had knowledge that the statements were false when they were published and that even if they didn't actually know, they published the statements with reckless disregard.

As stated above, the defamatory potential of "Savage Lust" was apparent. Petitioners had policies of getting disclaimers before publishing. They did not get any such disclaimer here. The publisher was at fault.

In *Dunn & Bradstreet v. Greenmoss Builders Inc.* 472 U.S. 749, 761, 105 S. Ct. 2939 (1985), this Supreme Court held that in a case involving a private plaintiff and regarding a matter of private concern both presumed damages and punitive damages, may constitutionally be awarded on a showing of negligence.

The District Court was constitutionally permitted to award damages upon a finding of fault as long as it did not utilize strict liability as a basis. The District Court was thus constitutionally permitted to impose presumed damages in this case.

Because each state under these circumstances is free to fashion its own standard for damages up to and including "presumed damages and punitive damages," the issue of whether a particular State, or Territory followed its own law in arriving at the damages awarded *is*

not of CONSTITUTIONAL dimensions. That issue, you have said in the *Dunn & Bradstreet* case said, is for the state Courts to decide. The District Court, as our state court in this case, and the Third Circuit, as our appellate court have decided. This is not now a matter of federal or constitutional law for the Supreme Court of the United States.

2. Rebuttal of Petitioner's "Issues"

Petitioner relies on *Bose Corp v. Consumers Union of the United States* 406, 485, 514 (1984) and *New York Times v. Sullivan* 376, 254, 258 (1964) in arguing the Third Circuit Court of Appeals "presumably" failed to review the entire record. There was no need to. The issues are matters of state concern where fault has been conclusively established as it was on this record. The *Bose* case predates the *Dunn & Bradstreet* case.

The Court in *Bose* found the defendant to be a "public figure." Here this plaintiff is a private figure. The Court was concerned about an "opinion" rendered about a speaker system, not about sexual impropriety and moral depravity in a story about a real place.

Petitioner's statement of this case concedes that it is a defamation cae involving a private plaintiff regarding a matter of purely private concern. Per this Court's decision in *Dunn & Bradstreet*, petitioner should not be allowed to claim "fault" because of a claimed failure of a review of the entire record for First Amendment issues. By definition therefore, this is not a First Amendment case that needs to be reviewed by this Court.

Issue II fails for the same reason as Issue I. This is no FIRST AMENDMENT case. Plaintiff is a private person. So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability or broadcaster of defamatory falsehood injurious to a private individual. See *Gertz v. Welch*, 418 U.S. 323, 347. Furthermore, when the "speech involved matters not of public concern . . . the state . . . (may allow) . . . awards of personal and punitive damages--absent a showing of actual malice" *Dunn & Bradstreet v. Greenmoss Builders Inc.* supra pp 761. The issue of culpability regarding fiction is moot in this case. The District Court found fault as a fact i.e. that the principals of the magazine knew of the existence of the Carousel Bar in St. Thomas, Virgin Islands and subsequently published the false statements with reckless disregard as to their truth or falsity.

As to upholding publishing of fiction standards, High Society Magazine itself established a policy i.e. and it insisted that an author sign a disclaimer that the publication would not infringe on any privacy or other right of any individual or entity. The Court found as a fact that High Society was culpable for violating *its own established policy.*

Petitioner's argument that fiction as parody should be exempted from the "private plaintiff matters of private concern" cases, and citation of *Hustler Magazine Inc. v. Falwell*, ___ U.S. ___, 108 S. Ct. 876 (1988) does not aid petitioner at all. That case is strictly one permitting parody of a *public figure.* The Court after clearly establishing that right as to public figures, pauses to admonish that

this principal is subject to limitations. It does not open the door to defamation by fiction as petitioners assert.

Petitioner is not saved by labeling each of its articles "fiction" and then proclaiming that fiction by definition is an untruth. They ask for a law that would allow the publisher to name real places, real people and real businesses without a duty to make an investigation in that location to determine whether the fiction may reasonably be understood as portraying an actual person or business. The Restatement (second) of torts section 564 comm. d recognizes such an investigation and determination as a publisher's duty. This duty to investigate is especially so with "fiction," since "fiction" is never a "rush to press" matter. Even giving petitioners the benefit of the doubt, there was time to investigate. There was no "hot news" deadline to prevent this investigation. High Society acted negligently and with reckless disregard when it published without investigating and without a disclaimer from its author.

Petitioners third question regarding the finding that "Savage Lust" was "of and concerning" Respondent's Bar is one of fact and not of constitutional dimension. It was an established fact that Respondent's Bar existed on the Waterfront of St. Thomas for *twenty years before* the publisher published "Savage Lust." The Carousel Bar was recognized by persons in Boston, St. Thomas and elsewhere as being the Bar referred to in "Savage Lust." The reader's belief that it was of and concerning respondent's bar was reasonable. There is no case that holds that a defamatory story must refer "specifically" to the defamed person and only to him as petitioner argues. Nevertheless

the facts here could still stand up to the standard proposed by petitioners.

3. Petitioner's Knew They Could Defame With Fiction

Petitioner's employees knew they could defame with fiction. Petitioner knew that it was quite possible to defame a real person with fiction. For that reason it had a strict policy of getting disclaimers before publishing such stories. Petitioner required its authors to give it disclaimers. It's purchase order forms also contained language disclaiming any violation of private person's rights. No such disclaimers were produced for "Savage Lust."

As professionals in the field of publishing, petitioner had a firm policy designed to insure themselves against defamation claims. Their vice-president, Ira Kirschenbaum testified at his deposition as follows:

> Q. Was there any procedure for rejecting an article if it appeared to depict a real person or place?
> A. As I generally said, we try to publish only fiction, since we are a non-controversial magazine, and if we felt anything was real, it would be rejected immediately. (Appendix K at 37)
> Q. In your professional opinion if you knew that this article referred to a specific business, would you have required an investigation?
> A. Yes.
> Q. Have you ever refused to publish an article that referred to a particular person?
> A. Yes. (App. K at 37)

When asked specifically what if any policy petitioner had regarding libel, Mr. Kirschenbaum responded as follows:

> Q. What exactly were you told or what information were you given with regard to libel?

A. Never to depict real people or real places in stories, unless they are meant to be that way.
Q. How many persons in your organization were told of this?
A. Everybody who worked on the magazine. (App. K at 37).

A. Still the same guidelines. Try to make sure everything is fictional, but we do not have an investigative team to go out into the field and research every story that comes in.
Q. When a story comes in, do you find out if there is such a place? You name St. Thomas.
A. We try to. (App. K at 37)

Kirschenbaum testified that Gloria Leonard knew that such a story had to be checked out before publishing. He testified as follows on that point:

Q. Did you have any discussions with Ms. Leonard as to procedures for investigating your stories?
A. Ms. Leonard does have a general working knowledge of what should be checked out before a story is published in High Society Magazine.
Q. Did you give her that knowledge?
A. We gave it to her, plus we have discussed it many times in our organization, although there are no formal written guidelines.
Q. What exactly was discussed?
A. That anything that is published should be checked out as carefully as possible and that if it is actual, that releases be obtained and if it is fictional, make best efforts. (App. K at 38)

See also the testimony of Gloria Leonard in Appendix K at 33 and the subsequent observation of the Court:

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in a fiction?

A. I believe you can. (lines 14-17)
Q. And as a professional, when would that occur?
A. Again –
MR. ARELLANO: Your Honor, that question is vague.
THE COURT: It isn't that it is vague, but you see now, Mrs. Mitchell, you have gotten this witness to answer a question in a way that is directly contrary to Mr. Arellano's opening statement as a lawyer.
MRS. MITCHELL: I know.
THE COURT: What do you expect me to do accept her word on this matter?
MRS. MITCHELL: No. She is the publisher and I think it is from her that the policy of her magazine and the policy of the industry should be learned.
THE COURT: The policy of the magazine is certainly within her competence. The policy of the industry is within her competence. But the legal aspect is not.
MRS. MTCHELL: I am not asking for the legal aspect. I was asking her to define for me what –
THE COURT: You asked the witness a moment ago something to the effect of whether it was possible to libel somebody in a piece of fiction and the witness answered, yes.
MRS. MITCHELL: Yes.
THE COURT: All right, Mr. Arellano in his opening statement said, did he not, that specifically because this is purely fiction it can't be libel?
MRS. MITCHELL: And your Honor, I am trying to show that the publisher knew that it could be possible to libel someone in fiction.
THE COURT: All right, very well. She has answered your question.

The District Court had ample evidence to find that petitioner knew it could defame with fiction and had a policy designed to protect them from defamation suits. They didn't follow it this time. The testimony of Mr. Kirschenbaum says they did. Ms. Leonard admitted

under oath that she recognized the potential for defaming a real person. Petitioner used disclaimers and releases. All of this was company policy because they recognized the exposure and the damages. They were at fault for not following it.

4. Petitioner's Industry Recognized That Erotic Fiction Could Defame A Private Person.

Petitioner produced Harvey Shapiro as an expert witness. Mr. Shapiro has a long history publishing erotic magazines. Mr. Shapiro admitted that erotic fiction could defame a private person. Mr. Shapiro stated that he would not include the name of a person in such a story if it seemed to identify that person. He even admitted that the actual identification of a private person in an erotic fiction story could be defamatory if it were not true.

> Q. Would you knowingly include the name of a business, an existing business, in one of your stories in a manner that would be derogatory or defamatory?
> A. No.
> Q. Would you include the name of a person who lives in a place if you knew that story is supposed to be about that person or seems to identify that person?
> A. No . . . (next question omitted)
> Q. Do you think that the identification of a private person in an erotic fiction story would constitute defamation if it were not true?
> A. Yes, I guess so.
> Q. Would you feel responsible if you defamed a real person?
> A. Yes. (App. L at 39)

Clearly the industry recognizes the danger that this type of material can do to a private person's reputation.

Mr. Shapiro disagrees with the stated position of petitioner's counsel that the very nature of fiction makes it impossible to defame a real person. Mr. Shapiro, we may assume, from his responses would not publish "Savage Lust" knowing that the Carousel Bar actually existed in St. Thomas.

5. Even Petitioner's Counsel Admits That The Constitution Demands That Care Must Be Exercised When Material Is Clearly Defamatory.

Petitioner admitted in its appellate brief that there is a duty on behalf of the publisher to investigate when the defamatory potential of the material is "apparent." On page 26 of its brief to the Third Circuit Petitioner concedes that the Constitution would permit a standard of negligence where the publication makes "substantial danger to reputation apparent." *Gertz v. Robert Welch, Inc.* 418 U.S. 323

Only a sexual pervert or a very jaded person could have failed to recognize the defamatory potential of "Savage Lust" if someone was identified. Perhaps in the world of so called "erotic literature" nothing is wrong with being described as the bar and the type of character portrayed as the "owner of the Carousel Bar" in "Savage Lust." Maybe their literature is so full of places like those described therein that they do not recognize the level of immorality and sleaziness attributed to the Carousel Bar and its owner in "Savage Lust."

This may explain why petitioner found nothing "apparently defamatory" in publishing a story about a real place that is described as being

> a nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup.

Perhaps to petitioner it is desirable to be portrayed as a person who would drug a customer's drink, have her chained to a mattress, watch while others acting under your direction force her to have oral sex, and afterwards have anal intercourse with her while she is under restraint.

Whether or not petitioner recognized the defamatory potential of that publication respondents believe that most persons would and know that the law as codified in the Restatement of Torts (Second) does.

6. The Restatement of Torts Provides That One Who Imputes To Another The Conduct Portrayed In Savage Lust Is Subject To Liability To The Other Without Proof Of Special Harm.

To be described as one who would do the acts described in "Savage Lust" is defamatory per se. Restatement of Torts 569, 570, 571 (Appendix H). The whole story is about how the "owner of the Carousel Bar" drugs this girl and forces her to submit to sexual battery. Such conduct is criminal. People go to jail for that kind of activity.

571 of the Restatement of Torts (Second) states

> One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is to a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.

Spiking a young woman's drink, kidnapping and committing sexual battery on her, all actions of the "owner of the Carousel Bar" would certainly constitute criminal offenses and or involving moral turpitude.

Section 573 of the Restatement of Torts involve imputations which adversely affect another's fitness for the conduct of his trade or business. Certainly no decent person wants to go to a bar like the one described in "Savage Lust," and/or be served by a person like the owner. Section 574 defines slanderous imputation of sexual misconduct. "Savage Lust" was full of all of these things. No decent person would want to associate with someone who would do this, nor visit an establishment in which such activities took place.

The defamatory potential of this story was clear as a bell and should have been apparent to petitioner's publisher. *Gazette, Inc. vs. Harris* et. al. 325 S.E. 2d 713 (1985) discussed some of the things that are considered apparently defamatory. An article in which a man is stated to be "man found guilty of fornication" was "apparently defamatory." Certainly if to describe a person as *guilty of fornication is apparently defamatory,* the actions described in Savage Lust are much more serious and glaringly potentially defamatory. Another article accusing someone of issuing a bad check also found to have been apparently defamatory.

It should also be noted that the Supreme Court of Virginia has an excellent discussion in *Gazette* on the application of the new Supreme Court's rulings regarding defamation by state courts. The Court goes on to discuss

the application of the Restatement in defamation cases and the standards of care to be applied.

I would hope that even the petitioner would admit that risk of defamation exist whenever one publishes a story that some local person, any person, would kidnap a tourist in a local bar, drug her and force her to submit to multiple rape.

I don't believe that the petitioner could deny that kidnapping is a criminal offense; that sexual battery is a criminal offense; that forcible drugging is a criminal offense. In view of this, the defamatory potential of "Savage Lust" was "apparent" and petitioner is liable for the damage that resulted to respondent personally as well as to his business.

7. The Law Does Not Excuse Defamation Just Because It Is Done In Context Of A Fictional Story.

The First Amendment does not grant a license to defame. The Constitution does not say, as petitioner urges, that as long as you call it "fiction" it is clean and neat and cannot defame anyone. The Restatement of Torts, 564(d), does not permit one to escape liability when one defames, merely because you call it "fiction." If recipients of the publication reasonably believe that a defamatory publication intended to refer to a real person, that person is defamed. See also section 580B. (Appendix H at 29)

Petitioner is subject to the provisions of the Restatement in this jurisdiction just as any one else. While petitioner enjoys the benefits and protection of the First

Amendment and the local law, so does respondent. Petitioner must respect the legal right and interest of a person in protecting the integrity of his or her good name and reputation. The District Court did not commit reversible error when it rejected petitioner's argument that liability could not be found because it is "fiction" and one cannot investigate or "vet" as they choose to call it, fiction. The Third Circuit summarily rejected it. The Supreme Court should also.

8. If the Petition For Writ of Certiorari is Granted this Court Should Reverse the Dismissal of Jaber Samad Complaint Against Petitioner.

If this Court grants the Petition for Writ of Certiorari, the finding that "Savage Lust" was not "of and concerning" Jaber Samad should be reviewed, reversed and damages awarded.

Respondents proved that Jaber Samad was the sole owner of the Carousel Bar at the time that "Savage Lust" was published. He had a blonde, beautiful, buxom girlfriend who looked like Margo Boland in the picture.

Respondents proved through the depositions and testimony of his witnesses at trial that readers, people in general community and his family, actually believed that Jackson Conrad alias Jack O'Connor in "Savage Lust," was intended to refer to Jaber Samad. Respondents proved and the *District Court held that*

> His (Jaber Samad) family became alarmed at Samad's seemingly decadent life style forced him to give up his girlfriend, and returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a Palestinian young lady whom he hardly knew, and did not love. The marriage though

> consummated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. *He did not, however, regain the trust and respect of his family.* (Emphasis added) (Memorandum Opinion App. B at 17)

Thus, respondent proved a false and defamatory publication was believed to be about him personally and caused him to lose the most important relationship of a person, that with his family. Tremendous damage was thus suffered by the individual, Jaber Samad.

The "similarity between Samad and Conrad is their association with the bar named the Carousel" (App. B at 21) is enough to have found that the "Savage Lust" was "of and concerning" Samad. The Restatement of Torts (2d) §564 (d), comment 6 specifically states that "it is enough if there is such a description of *or reference* to him that those who hear and read, reasonably understand the plaintiff to be the person intended (App. H at A - 27).

Respondent proved that people thought "Savage Lust" was "of and concerning" Jaber Samad because of its *reference* to him by his ownership of the Carousel Bar, by reference to the description of his girlfriend and by reference to his apartment being at Sapphire on the beach.

There were sufficient facts from which to find reasonable the actual belief of plaintiff's family that "Savage Lust" was "of and concerning" him personally, as well as of and concerning business.

That part of the District Court's Judgment that denied recovery for such damage to Jaber Samad should be reversed.

CONCLUSION

The District Court of the Virgin Islands and the Third Circuit Court of Appeals having followed this Court's direction and having awarded presumed damages after a finding of fault on the part of the publisher of a defamatory publication, should be affirmed. No conflict among the Circuits is raised. No issue of Constitutional law needs resolving. Petitioners seek a license to defame. They should not be granted it.

This petition for a Writ of Certiorari should be denied.

DATED: October 17, 1988

Respectfully,

ETHEL MITCHELL
Counsel for Respondents

APPENDIX A

"SAVAGE LUST"

by Russell Smith

Jackson Conrad was the day bartender at Malcolm Cunningham's joint for two years, missing only two days work and late on a single occasion when the taxi in which he was speeding to worked crashed into a stalled bread truck.

Unlike average bartenders, Jackson had a special smile for all the girls and – as they say in the ginmill business – a tin ear, meaning he could arbitrate any bar argument with exquisite grace. He listened to his customer's monotonous dreams of success and weekly catastrophes like a priest hearing confessions. Jackson never forgot a face and remembered one man's poison from another's with astonishing accuracy.

At the end of his day Jackson dutifully counted the cash and fixed the "bank" for the night man before bagging the take and dropping it off at the Second National's night vault on the way to his hotel. For two years, day in and day out, Cunningham's cash register jingled merrily and business maintained a daily average that made the owner's heart glow. Jackson Conrad's absolute dependability never failed to impress everyone in the ginmill business. A steady bartender who didn't cheat somewhere along the line or drink up the profits was as rare as a bronze tiddlywink.

Then, one Friday, no Jackson Conrad! The regulars fretted and speculated on the stoop next door while

waiting for Jackson to open up. After two hours, Cunningham was telephoned the bad news. He hurried over. The kind of calm associated with impending disaster settled over the silent bar like an evil fog. When that longest day had ended, Jackson still hadn't appeared. Neither had he called. Cunningham dispatched one of the regulars to Jackson's hotel, only to find that Jackson Conrad had checked out!

The weekend dragged. It wasn't until the following Monday, with Cunningham himself behind the stick, that he decided to call the bank. The neighborly bank officer jokingly reported that the bank's very foundations were quaking since Cunningham's last withdrawals.

"What withdrawals?" Cunningham suddenly felt weak in his knees.

Jackson had forged withdrawals slips for all three of the bar's working accounts. The details were enough to drive even Cunningham to drink. Jackson had literally wiped him out!

The Carousel Bar on the island of St. Thomas in the U.S. Virgins is a nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup. Isolated in a barrio section of Frenchtown, the Carousel is a symbol of tropical decadence and moral decay that puzzles as much as it delights. It attracts a breed of first-class cruise ship tourists and crew who find the cheap and gaudy atmosphere exquisitely quaint and the artificial desperation of the derelict clientele amusing. It's the last place of the face of the planet anyone searching for the fugitive Jackson Conrad would look.

It was by sheer coincidence that Margo Boland, once one of Cunningham's prettiest customers and well known to Jackson for her ritualistic consumption of Bombay gin, sailed the cruise ship "Song of Norway" into the harbor of St. Thomas exactly two months to the day after Jackson's masterful coup. Keeping a date with a nice man she had met on board who said he knew of a quaint native bar with a mandolin player and tasty fried chicken, the Fates collided and Margo ran into Jackson. She was familiar with every detail of Jackson's coup and secretly admired him for it. A more brilliantly executed maneuver, one of stealth, consummate cunning, boldness and utter courage, existed only in fiction.

As Margo observed Jackson from the deepening shadows, his green mirrored glasses reflecting the existing light, she felt an unquenchable surge in her loins. He was puffing easily on a thin cigarillo and wearing a stunning white tropical suit and native straw hat of green bamboo. She suddenly felt an unscratchable itch bubbling behind her pink nipples. Margo couldn't believe her eyes. The incredible churning sensation of wild excitement in the pit of her stomach intensified as she stared at Jackson.

"What is wrong, dear Margo?" her companion asked.

She shook her beautiful blond head. "Oh nothing. Nothing, really." Margo smiled her sweetest smile. "It's nothing, Charles. I just suddenly feel like being alone." She touched his shoulder. "You wouldn't mind terribly, would you Charles It's just one of those nostalgic things that girls go through."

Charles was noble, and after being reassured with a firm squeeze on his semi-erect penis that she could find

her way back to the ship, he whispered, "Margo, I'll see you back to the ship, he whispered, "Margo, I'll see you back on board. I do understand, dear. Come to me for a nightcap. Cabin 904."

Changing her table for a less conspicuous one in the shadows, Margo reflected on Jackson's scam. An hour passed and she let herself be picked up by a U.S. Coast Guard officer, from whom she learned the current news and rumors about Jackson. He was now known as Jack O'Connor. He was extremely rich, and upon his arrival had bought the Carousel for cash. He visited it from time to time to check on the bartender and the till. He owned a house on the sea, kept three natives servants and read a great deal. He was a loner, made no fresh friends and kept few acquaintances other than those to whom he paid local business graft. Everyone familiar with Mr. O'Connor believed he had done hard time in some foreign jail and was now on parole, minding his own business in an agreeable way.

As the officer went on about himself, Margo let him nibble her lips, kiss her eye, use his tongue and feel her ripe breasts. At the same time, she didn't discourage his hand from stealing up under her skirt to finger her moist pussy. Her hunger for Jackson was becoming so fierce, so intense, that she broke out in a cold sweat. Margo had always craved Jackson's superb body, a savage lust.

"Are you all right?" the Coast Guard asked. He was alarmed and pulled his hand from between her bare thighs as if it were burning.

Margo rubbed sensuously against his shoulder. She used her soft stare. "Yes," she purred, brushing her lips

over his. "Yes, but don't stop. Put your nice fingers back where they were. Touch my pussy. It's all wet. But tell me more about that mysterious man."

Suddenly her glance flew to Jackson and a wild shiver swept over her like an eight-foot tidal wave. He was staring at her! Jackson took off his mirrored glasses and squinted. He recognized her!

He pushed his way rudely through the natives jiving on the dance floor. Margo came as close to fainting as she'd ever remembered. Ever pore was oozing blood. Her mouth flew open, her eyes zoomed in and out of focus. She caught her breath in fear as his bulk loomed closer.

There was no escape. Oh God! Blinded by reality, Margo suddenly saw Jackson as the young Orson Welles – chin slanted, eyes piercing, his tongue moistening his lips. With a gentle clearing of his throat and that thin smile from behind dark, leaden eyes, he sat next to her.

* * *

Jackson's house was down by a secluded crescent beach, where his yacht, the "Bally-hoo,", swayed at anchor in the light Atlantic breeze. The landing dock was simmering in the tropical heat when Margo surfaced into consciousness.

She was naked except for her high heels. As she struggled to clear her brain, she discovered she was chained to a mattress spring. The raw metal was cutting into her flesh. Able to raise her head slightly, she saw a criss-cross pattern of pink welts lacing her thighs which were spread obscenely by the chains locked to her ankles.

Soon she realized she was lying on a cement patio facing the ocean. The tide was lapping gently, a lone gull crying in the distance. She could still taste whatever it was Jackson had drugged her with back at the table. Margo strained and tugged with all her strength. The hot sun blasted the unsheltered portion of the patio and boiled the breezes that fanned her nakedness. She wondered suddenly if she'd been raped. Unable to stretch her neck high enough to search between her thighs, she moved the muscles of her pussy, but they responded with no intelligent signal.

Drifting in and out of consciousness, she recalled Jackson's first words – how politely he had dismissed the Coast Guard lieutenant, how eagerly she had accepted his invitation for a drink. "Margo, for old times' sake," he had said. "We'll have no comment about this coincidence, right? But I am pleased to see you again, despite the circumstances. You are still so beautiful, so sexy!"

She clung to him. "Many people missed you terribly, Jackson. You were part of our lives."

Margo was unafraid, secure she could cope. How many hundreds of times had she sat opposite this handsome man at Cunningham's bar? For two years she'd been served by Jackson Conrad. She could not recall a single time when he'd been anything but kind and polite, tender with a compassionate understanding. He had always greeted her with piercing but friendly dark eyes – eyes she secretly directed to caress her breasts, to seek indecencies on her body, to linger on her bare arms, to caress her fingers and her exposed thighs when her slit skirt would open and ride up. When Margo used the

ladies room and wiped her moist pussy, she would image Jackson's beautiful eyes on her naked pussy lips, penetrating as deeply as she wished his cock would. Once, when her period struck in the bar, Jackson provided an emergency tampon. The intimacy impressed her.

Margo could never count the number of soft afternoons alone with Jackson when she had fantasized about him asking her to fuck his cock at the end of the bar, to suck him off down on his knees begging to lick her aroused pussy in the ladies' room as she sat on the toilet vulgarly peeing. Of course, it had never happened. Many a lonely night Margo masturbated her clitoris while imagining the iron beauty of Jackson's cock, his magnificent body, his hot lips on her stiff nipples, his long fingers stroking, squeezing, splitting her luscious buttocks, his tongue in her asshole.

She must have been awake now for more than an hour. She began to call his name, softly at first, then with increasing urgency until finally she was screaming at the top of her lungs. She sobbed in and out of scattered dreams. As dusk settled on the Caribbean, her body began to ache. The raw steel springs were lacerating her skin. Margo's delicate wrists and ankles were numb from struggling and twisting, her left wrist severely swollen.

Night came and Margo was cruelly awakened by a bright burst of light flooding the patio. Her screams careened and ricocheted in the darkness like lazer beams. She tried to relax, urine flooding out of her. Suddenly thirsty, her lips were dry and crackling. Would no one come to help? She began babbling, humming nonsense tunes.

It grew late and Margo was asleep again when she felt her wrists and ankles being released. Then, in the darkness, she felt her aching, tormented body being lifted and carried through a doorway. The icy blast of air conditioning made her shudder.

Now she was being washed with scented oils by a naked black girl. A younger girl watched without smiling. A tall back man, a giant, with an enormous erection, fondled himself absently as he stood at the foot of her bed, the white of his eyes like that of his teeth and the sheets.

"Tell me where I am. Please. Where is Jackson? Please help me. I can pay, I beg you!"

No one spoke. The stone-faced black girl was now kneeling, pushing Margo's knees up and licking tentatively between her open thighs. Her red tongue explored Margo's pussy. Margo tried to raise herself to soothe her inflamed wrists, but the black man slapped her face. The younger girl was now rubbing oil over Margo's breasts, massaging them lasciviously, pinching her nipples and slapping her breasts with her open hand.

The black man stood. He climbed onto the bed to straddle his thick hairy thigh around Margo's head. He whispered to her to open her mouth. Margo surrendered. Wordlessly, guided his heavy black weapon between her lips. Margo sucked and flashed her tongue, her eyes closed. "Open your eyes, bitch!" he said.

Flexing her fingers and toes, Margo spread her legs wider as the girl on her knees sucked and chewed her pussy lips. When Margo felt the first tickling in her clitoris, she began to squirm. She tried to pinch her hot

nipples, but the black man pushed her hands away. His glistening cock slid silently in and out of her wet mouth, her head rising and falling as she slurped and gulped him.

When she felt the black's cock begin to pulsate and sensed it was on the verge of ejaculation, she reached for it. Her fingers curled around the slippery wet rod. Her other hand grabbed greedily for his sweating balls. She squeezed and manipulated them until she felt the lunge that signaled explosion. His cock leaped and flooded her mouth with raw cum. At the same instant, Margo felt her own orgasm scream as the girl's tongue and teeth and fingers mauled her throbbing pussy.

When the black pulled his cock out, the girls rolled Margo over on her belly. One anointed her wounds while the other brazenly fingered her anus after spreading her thighs wide. Margo could feel any number of thick fingers probing deep into her bowel.

"Please," she moaned. "Oh God! Please help me! Where is Jackson? I'll do anything he wants. Anything!"

She realized she was being blindfolded. A sharp stinging sensation in her right buttock followed by a vicious slap. A needle, what else? This time she didn't want to resist. Total surrender, humiliation. Suddenly Margo felt as if she were floating, a combination of bizarre sensations like drifting, sinking, then flying.

A different penis penetrating her asshole with one solid thrust. Margo could feel female hands supporting her middle and the beginning of the ass-fuck she'd always dreamed of. The pounding of the thick cock into

her sucking anus brought animal grunts and low whimpering, then crazy hysterical shrieks of delight!

Margo's brain was reeling. She could hear herself muttering obscene words, encouraging her fucker. With each violent thrust of the new cock, her body shifted higher and higher on the bed until she was pushed almost off it, supporting herself with her hands on the floor. When she began humping feverishly back on the cock and felt the terrible churning in her pussy that scrambled her senses, the spasm of her orgasm and the involuntary convulsions in her crazy pussy set her brain ablaze.

"Oh my God! My God, oh my God, fuck my ass!" she cried over and over. "God yes, fuck me Jackson! Oh my God, fuck my ass!"

* * *

The "Song of Norway" customarily sounds two earth-shattering ear-splitting blasts as it announces its departure. Before she sails from the dock and all the hawsers are undone, the deep-throated horn gives three mighty blasts.

In Cabin 203, first-class on the starboard side of the gleaming white vessel, Margo Boland lay naked on her bed. When she awoke, she had no idea where she was, but as the ship's great engines began to rumble she realized she was on her way to the next tourist port. She sighed and tried to relax. Lighting a cigarette, her eyes caught sight of a bouquet of flowers and a wicker basket of tropical fruit near the cabin door. Her heart leaped! Flying across the cabin, her fingers fumbled as she read the card: "Love from Charles. I've flown back to N.Y."

Throwing on her robe, her heart pounding, she rushed out on deck. She saw him, Jackson Conrad, standing near the West Indies Company shed, with the cigarillo, the hat, the white suit and the green mirrored glasses. Margo waved frantically, yelling his name.

Jackson brought an admonishing index finger up to his lips and motioned it like a school teacher. Margo saw his familiar bar grin and could almost hear the warning "shsssh" as he turned his back and dissolved into the pier shadows.

APPENDIX B

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD
S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant.

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MEMORANDUM OPINION

CHRISTIAN, Chief Judge

I

INTRODUCTION

Were the issue presently before this Court whether the published story which forms the basis of this lawsuit were more properly and accurately described as "smut"

as counsel for plaintiffs disdainfully styled it, or "sophisticated gentlemen's entertainment," as the publisher of the magazine which carried the story proudly proclaimed it, the conflicting contention would be utterly facile of resolution. The case with which the Court is faced, however, is an action for defamation[1], spawned by the publication of a fictional short story, "Savage Lust", in the December, 1981, issue of a magazine which appears on the newsstand under that euphemistic appellation, High Society.

Plaintiff, Jaber Samad, was president and sole shareholder of S & H Management Corporation ("S & H"), the co-plaintiff, which operated a bar and restaurant called, and widely known as, The Carousel. Defendant, Drakes Publishers Inc., is the successor in interest to High Society, Inc. ("High Society"), the original defendant, by which the magazine High Society was, at times pertinent herein, published.

The story "Savage Lust" was authored by one Russell Smith, who had once been employed as an editor by a sister publication of High Society. Although a co-defendant throughout most of the litigation, Mr. Smith was severed from the action on August 12, 1985 on stipulation of both sides. He was a free lance writer, however, at the time he was approached by an editor of High Society to write a short story.

"Savage Lust" is the story of Jackson Conrad who once tended bar in a city on the mainland. He fled to St. Thomas after having embezzled all monies from his

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[1] This case was tried to the Court and submitted after extensive post-trial written summations.

employer's several bank accounts. In St. Thomas he assumed an alias, Jack O'Connor, and bought a bar, the "Carousel," for cash.

The fictional Carousel is located in an "isolated barrio" in the Frenchtown section of St. Thomas in the "U.S. Virgins", and is described as a "sailor's dive complete with half-naked Martinique whores" and a "symbol of tropical decadence and moral decay." It is here that Conrad encounters a woman from his past. Margo Boland, who nurtures an unsatisfied lust for the mysterious Conrad. She is drugged and then taken to Conrad's secluded beachfront residence where she is chained to the deck. After several hours in this position she is forced to engage in a night of sodomy with Conrad and his servants.

The plaintiff, believing the story to be about Samad and the real Carousel, sued to recover for injuries resulting from the allegedly defamatory storyline of "Savage Lust."

II

FACTUAL BACKGROUND

A real bar and restaurant known as the "Carousel Bar" was located on the waterfront in St. Thomas, about a mile from Frenchtown. The bar was popular with both sailors and tourists.

Although its registered name was the "Waterfront Cafe," the establishment was well known as the "Carousel" to local residents and visiting tourists alike. The bar had been operated by a former owner, John Tallman, for a number of years as the "Carousel Bar". Tallman did not sell the rights to the name when he sold the bar to Samad.

A large metal sign with the name "Carousel" hung outside the bar during the entire period that the business was owned and operated by S & H.[2] A sign with the name, the "Waterfront Cafe" hung below the "Carousel" sign.

Russell Smith was well aware of the existence of the real Carousel bar when he wrote the story. Smith had lived in St. Thomas for a period of six or seven months during the 1960's. He returned to the island in November of 1980. During this stay he visited the Carousel in search of his acquaintance, John Tallman. Moreover, one of Smith's wives had worked at the Carousel during Tallman's proprietorship.

Smith and a female companion[3] made several visits to the Carousel in November, 1980. During these visits he became acquainted with Samad. The relationship began on friendly terms until Smith proposed that Samad engage in a sexual relationship, a veritable menage a trois, wholly unimagined by Samad, with Smith and his female companion. Samad adamantly refused and angrily, and with vile epithets ordered Smith to leave the premises, or face bodily ejection.

Samad and Smith met again in June, 1981. Smith then asked Samad if he could write a story about him (the plaintiff). Samad vehemently refused to give permission.

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[2] The sign "Carousel" hung outside the bar from 1963 to 1983.

[3] Plaintiff Samad refers to this woman as Smith's wife. At his deposition, however, Smith referred to her as his girlfriend.

Smith returned to New York and in July 1981, submitted "Savage Lust" to High Society.

It was an established policy of High Society that all writers who submitted articles or stories which were accepted for publication must sign a "purchase order" before payment would be remitted. In the said purchase order there was a disclaimer which provides that publication (would) not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity.

Smith never signed a purchase order. Despite this, Gloria Leonard, High Society's publisher, accepted the story for publication.

Leonard knew of the existence of the real Carousel. Leonard had resided in nearby Puerto Rico for a period during the 1960's, at which time she had made frequent visits to St. Thomas. The Carousel was then in its heyday. At trial, Leonard testified that she had no knowledge of the existence of the real Carousel. She had had occasion to walk along the waterfront several times. She testified that she could recall the businesses located on either side of the bar. Since her relocation to the mainland, Leonard returned to St. Thomas five or six times. We find that Ms. Leonard's testimony was incredible in that it reflected a selective memory failure. We find, therefore, that she knew of the Carousel's existence. Moreover, Ira Kirshenbaum, vice-president of High Society, testified that he had also visited St. Thomas before the publication. His claimed lack of knowledge of the Carousel is likewise unworthy of belief and I find to the contrary.

A friend of both Samad and his girlfriend, who lived in Boston, there happened to read "Savage Lust." Apparently believing that the story was about Samad and his business place, he called Samad by telephone and told Samad about the story. Shocked and boiling mad, Samad at once purchased his own copy of the magazine at a local store and read the story.[4]

Samad believed the story had been written by Smith about him and his bar in retaliation for Samad's vehement refusal of Smith's sexual proposition. A distraught Samad told his brother, Foad about the story. Faod (who was able to procure the last available copy of the magazine) in turn contacted the rest of the Samad family about the story. His family became alarmed at Samad's seemingly decadent lifestyle, forced him to give up his girlfriend, and tricked him into returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a palestinian young lady whom he hardly knew, and did not love. The marriage, though consummated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. He did not, however, regain the trust and respect of his family.

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[4] During this period approximately 275 copies of High Society were sold monthly from newsstands in the Virgin Islands. Defendant derived annual revenues of $5,841.00 from sales in the Territory. Consequently, by Order dated April 9, 1984, we held that the jurisdiction requirements of 5 V.I.C. § 4903, and those demanded by the U.S. Constitution had been satisfied.

III

GENERAL AND CONTROLLING PRINCIPLES

Despite First Amendment ramifications, defamation actions are essentially territorial causes of action. McDowell v. Paiewonsky, 769 F.2d 942, 945 (3rd Cir. 1985); Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072, 1077 (3rd Cir. 1985). Accordingly, adjudication of the case, sub judice requires analysis under both Virgin Islands and Federal Law. McDowell v. Paiewonsky, 769 F.2d at 945. If the Court determines that defendant has injured plaintiff's reputation under the applicable territorial law, we must then determine whether the imposition of liability is nonetheless prohibited by First Amendment considerations. Steaks Unlimited v. Deaner, 623 F.2d 264, 270 (3rd Cir. 1980).

The rules of the common law as expressed in the Restatement (Second) of Torts have been adopted by the Virgin Islands as the substantive law governing defamation actions.[5] McDowell, 769 F.2d at 945; 1 V.I.C. § 4 (1967).

Liability for defamation is created where there is:

(a) a false and defamatory statement concerning another;

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[5] V.I. Code Ann. Tit. 1, § 4 (1967) provides that:

"The rules of the common law, as expressed in the Restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in absence of local laws to the contrary."

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Plaintiffs have the burden of proving each of the above elements. Id. at 613.

There is no liability if the communication was privileged. Defendant had the burden of showing the existence of a privilege as provided in RESTATEMENT (SECOND) OF TORTS § 613(2) (1977). Defendant, however, did not raise this issue and the existence of such privilege is not apparent. Accordingly, we conclude that the requirement of unprivileged publication to have been satisfied.

(a) THE STATEMENT PUBLISHED MUST CONCERN THE PLAINTIFFS

Plaintiff must show that the recipients of the communication "correctly, or mistakenly but reasonably, understands that it was intended to refer" to them. RESTATEMENT (SECOND) OF TORTS § 564 (1977). See also Id. at 558.

Defamatory statements found in works of fiction are actionable. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977). The fact that fiction purports not to concern real persons or events is of no consequence in determining the merits of a defamation action. Note,

"Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520, 536-537 (1983); see also Fetler v. Houghton Mifflin Company, 364 F. 2d 650, 653-54 (2nd Cir. 1966).

Works of fiction are actionable if the reader reasonably understands that the characters are a portrayal of the plaintiff. See, e.g, Geisler v. Petrocelli, 616 F.2d 636, 639 (2nd Cir. 1980); Middlebrooks v. Curtis Publishing, 413 F.2d 141 (4th Cir. 1969). The identification of the plaintiff with the fictional character is reasonable if the description of the character and the events contained in the narrative are so similar to reality that those acquainted with the plaintiff would understand that the plaintiff is the character so depicted. Felter, 364 F.2d at 651. Mere similarities of name or other superficial similarities will not suffice. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977); Middlebrooks, 413 F. 2d at 143. Furthermore, testimony that someone understood that the character depicted the plaintiff does not satisfy this test. Id.

The plaintiff produced witnesses at trial who testified that they actually believed "Savage Lust" was written about Samad and the Carousel. Neither the physical person of Samad, nor the events of his life, parallel those of the fictional Conrad. Plaintiff is Jordanian; he migrated to St. Thomas from Palestine as a young boy.[6] He attended Charlotte Amalie High School and the College of the

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[6] We draw no support from defendant's argument that plaintiff is Jordanian and Conrad is caucasian. From the sparse physical description of the character, we are unable to discern the race of Conrad.

Virgin Islands. Samad left the islands to attend the Greater Community College in Connecticut. Upon his return to St. Thomas, he purchased the Carousel. The purchase was partially financed by John Tallman, a former owner by means of a promissory note. Samad borrowed money from Barclay's Bank and his brother to make the necessary downpayment.

Moreover, Samad neither lived with servants, nor did he live on a secluded beach. Rather, he shared a studio apartment with his girlfriend. The apartment was located on a popular St. Thomas beach. He was not rich, nor did he employ servants.

The only similarity between Samad and Conrad is their association with a bar named the Carousel.[7] In light of the marked differences between the two men, no identification of the two as the same person would be reasonable. Thus, we need not consider further the merits of Samad's claims.

Our finding that the story was not "of and concerning" Samad does not mandate a finding that S & H Corp. was not defamed. The dissimilarities between Samad and Jackson would not necessarily prevent patrons of the bar, and others, from reasonably believing that "Savage Lust" was written about the Carousel.

Both bars are known as the Carousel. Both border on the St. Thomas Waterfront. Like the fictional bar, the real

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[7] Conrad actually own the fictitious bar. The real carousel, however, was owned by S & H. Samad was the sole shareholder of S & H.

Carousel was located in the "U.S. Virgins", and was popular among tourists and was a heavy favorite of sailors of the United States Navy, when on shore leave. Samad's girlfriend, who is tall, blond, and buxom is similar in appearance to the drawing of a woman in the illustration accompanying the story. Samad's girlfriend sometimes worked at the establishment, and, in any event, was there very frequently. While the woman in the illustration appears to have red hair with blond streaks, the caption beside the picture describes Margo Boland as a blond. And, since the Court finds that the picture, of a woman chained to a divan, is intended to depict Margo Boland, the Court similarly concludes that the illustration is that of a blond woman, generously appointed in the area of the bosom, as Samad's girlfriend was described in the testimony.

Furthermore, the Greenhouse, a bar and restaurant located next door to the Carousel was rumored, during that period, to harbor prostitutes from Puerto Rico who would sell their services to sailors in backrooms of the bar.[8] These rumored activities and the proximity of the Greenhouse to the Carousel, both highly popular with sailors on leave, reinforces the reasonableness of the

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[8] These rumors indeed subsequently became a confirmed fact when a physical altercation between a sailor and one of these "ladies of the night" in a backroom of the Greenhouse ended up before this Court in felony charges docketed at Criminal No. 82-106.

belief that "Savage Lust" was written about the Carousel.[9]

We are not dissuaded by the fact that the fictional Carousel is located in Frenchtown. The area of St. Thomas known as Frenchtown lies about a mile, or less, from the section of the Waterfront, at which the real Carousel is located. The illustration which accompanied the story pictured two islands across the bay. This scene is similar to that which one would observe looking seaward from the waterfront area in the vicinity of the real Carousel, and bears little, or no, resemblance to the water scene looking out from Frenchtown.

In light of the above similarities a reader could reasonably believes, as readers did reasonably believe, that "Savage Lust" portrayed the real Carousel and activities conducted therein. Consequently, the Court finds that the story was of and concerning the Carousel bar and restaurant operated in St. Thomas, in the United States Virgin Islands by S & H.

(b) THE STATEMENT MUST BE FALSE AND DEFAMATORY

A communication is defamatory if it tends "to harm the reputation of another" and lower him in the estimation of the community or . . . deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS (1977). "A corporation . . . cannot be

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[9] As stated above, the bar was well known locally and elsewhere as the Carousel. Thus, we attribute no significance to the fact that the registered name of the bar was the "Waterfront Cafe."

defamed by words . . . which would affect the purely personal repute of an individual. W. Prosser, Law of Torts § 111, at 739 (4th ed. 1977). A corporation, however, does have a business reputation, and may maintain an action when the publication of a false statement adversely affects it in the conduct of its business or deters others from dealing with it. Id. at 745; RESTATEMENT (SECOND) TORTS § 561 (1977).

The corporation need not be specifically named; defamation may be by implication. Note, "Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation," 75 Column. L. Rev. at 966. Moreover, liability exists if the publisher wrongfully led the recipients of the statement to believe that the corporate owner knowingly acquiesced or participated in immoral activities on its premises. Id. at 967 n. 24. Cf. El Meson Espanol v. NYM Corporation, 521 F.2d 737, 740 (2d Cir. 1975).

"Savage Lust" portrays the Carousel as a "sailor's dive" where one can meet "half-naked Martinque whores. The bar is further described as a "symbol of tropical decadence and moral decay." The fictional Carousel is a place where a female customer can be drugged and from which she can be kidnapped – by the owner.

Based on the above portrayal of the bar's management, a reader could reasonably infer that the owner's actions, at a minimum, amounts to knowing acquiescence in immoral and illegal conduct on the premises. Such a belief would deter a desirable clientele from patronizing the bar.

Furthermore, the representation that such behavior was normally acceptable in the bar is clearly false. The real Carousel was a respectable establishment and not a place frequented by the type of disreputable characters depicted in the story. In these circumstances, we conclude that S & H has carried its burden of proving that the communication published by High Society is both false and defamatory.

(c) THERE MUST BE FAULT ON THE PART OF THE PUBLISHER

Addressing the issue of fault, we find that High Society has, and had at the time here pertinent, a firm policy of not depicting real places in their fictional stories. In order to insure that such stories do not portray real places, High Society requires its authors to sign a purchase order containing a disclaimer. Smith never signed the required disclaimer. In addition, both Leonard, the publisher who accepted the story for publication, and Kirshenbaum, the vice-president of High Society, knew of the existence of the real Carousel located in St. Thomas. Under the circumstances, defendant had a duty to insure that any story published in its magazine which named the Carousel Bar located in St. Thomas, Virgin Islands did not contain false statements. Defendant, as we have found, knew, because its principal officers knew, of the existence of the Carousel, its true nature and its actual activities. Thus, we attribute to defendant, the knowledge that such statements were false. But even giving the defendant the benefit of any doubt that there might be, if it did not truly know that those statements were false, it acted with reckless disregard as to the truth or falsity of

such statements. Thus, S & H has satisfied its burden of proof regarding the culpability of defendant.

(d) PROOF OF SPECIAL HARM IS NOT REQUIRED

Special harm is defined by the RESTATEMENT (SECOND) OF TORTS, as the loss of something having pecuniary or economic value. RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977). Plaintiff's proof presented at trial consisted solely of Samad's own self-serving testimony. There was no corroborating evidence of economic loss. Such proofs are insufficient to demonstrate loss of income. Connally v. Chardon, 1978 St. X Supp. 372 (DIV 1978).

A corporation, however, may maintain an action for defamatory words which discredit it and tend to cause loss to it in the conduct of its business. RESTATEMENT (SECOND) OF TORTS § 561 comment b (1977). Such a statement is actionable per se. Damages are assumed to flow from the publication of statements of this nature. Thus, proof of special harm is not required. Id. at § 621 comment a.

The publication of "Savage Lust" satisfies the foregoing test. The story, if read and believed by certain potential customers, would dissuade them from patronizing the Carousel. Such being the case, no proof of economic loss is necessary.

(e) CONSTITUTIONAL LIMITATIONS

In the landmark case of New York Times v. Sullivan 376 U.S. 254 (1964), the United States Supreme Court held that the First Amendment limits the reach of state defamation laws. The Court found that the First Amendment

afforded one the right to criticize public officials, without the common law defamation restraints. Id. at 269. The Court held, therefore, that a public official cannot recover damages for defamatory falsehoods absent malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280.

The Supreme Court further explicated the limits of the First Amendment on state defamation law in Gertz v. Robert Welch, Inc., 418 US 323 (1974). Gertz involved the issue of whether a plaintiff who was not a public official could recover damages for statements which constituted libel per se under Illinois Law. The statements in Gertz weighed the competing interests of a state to protect its citizens from defamatory falsehoods against the First Amendment concern of free debate on public issues. Striking a balance, the Court held that:

> "So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Id. at 347.

The High Court opined that the legitimate state interest in compensating private individuals for injury to reputation extended only to compensation for actual injury. Thus, the Court reasoned that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Id. at 349.

The Supreme Court made its latest pronouncement on the interplay between state defamation law and the

First Amendment in Dunn & Bradstreet, Inc. v. Greenmoss, ___ U.S. ___, 105 S. Ct. 2939 (1985). Dunn & Bradstreet involved the defamation of a private plaintiff regarding a matter of purely private concern.[10]

The Court held that under the circumstances presented by Dunn & Bradstreet, the award of presumed and punitive damages on a showing of mere negligence was constitutionally permissible. We note that a state or territory is still free to choose for itself the appropriate standard of culpability required prior to the imposition of liability in a defamation action which involves a private plaintiff and a dispute over private concerns.

As stated above, defendant acted with culpability sufficient to satisfy the 'actual malice' standard announced in New York Times. Therefore, regardless of the standard chosen by the Virgin Islands, liability for presumed damages will be imposed in this case. As a consequence, we do not decide if negligent actions would be sufficient to justify the imposition of liability. Such a case is not before us.

While we are content to rest our decision that plaintiff S & H was indeed defamed by defendant, and is entitled to an award of money damages, even in the absence of proof of actual or special loss, we feel moved to note a further basis of liability in this cause.

The Supreme Court in Dunn & Bradstreet, held that under the circumstances there presented, the First

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[10] As in Dunn & Bradstreet, S & H is also a private plaintiff involved in a matter of private concern.

Amendment does not prohibit the recovery of presumed or punitive damages on a showing of fault less than actual malice. 105 S. Ct. at 2948. The Court did not, however, alter the holding of Gertz which provided that states may choose the appropriate standard of culpability required in a defamation action involving a private plaintiff, so long as they do not impose a standard of strict liability. Gertz, 418 at 347.

By adopting the RESTATEMENT (SECOND) OF TORTS, the Virgin Islands has defined the standard of fault necessary to impose liability for defamation actions brought in this territory. Guided by the principles enunciated in Gertz, the RESTATEMENT (SECOND) OF TORTS provides that damages which flow from a defamation which is actionable per se must be proven and cannot be presumed. RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977). The American Law Institute has taken no position on whether recovery, in the absence of proof of actual harm, is permissible when a defendant acted with 'actual malice' as defined by New York Times. RESTATEMENT (SECOND) OF TORTS Caveat to § 621 (1977).

In the absence of an existing applicable Virgin Islands statute or relevant section of the RESTATEMENT (SECOND) OF TORTS, we are guided by the general principles of common law.

At common law, a publisher of a false and defamatory statement who acted with 'actual malice' was liable for damages which were assumed to flow from the defamatory statement. Gertz, 418 US at 349-50. As stated above, defendants in this action acted with culpability

which satisfies the standard of actual malice. That being the case, we conclude that plaintiff may recover presumed damages as caused by the defamatory statements.

IV

CONCLUSION

On all the foregoing this Court concludes that Plaintiff Jaber Samad was not defamed by the publication of the story "Savage Lust" and is, therefore, not entitled to recover from defendant Drakes Publishers, Inc. It is our conclusion, however, that Plaintiff S & H Management Corporation was defamed by the publication of the above-mentioned story and is entitled to recover damages from defendant Drakes Publishers, Inc. in the sum of Seventy-five Thousand (75,000.00) Dollars, together with partial indemnification for costs and attorney's fees.

DATED: March 2, 1987

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PASSAGE, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant,

ETHEL CARR HUNTER MITCHELL, ESQUIRE
25A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands 00801
Attorney for Plaintiff

JOSEPH B.W. ARELLANO, ESQUIRE
Law Offices of Campbell & Arellano
P.O. Box 11899
St. Thomas, Virgin Islands 00801
Attorney for Defendant

MEMORANDUM AND ORDER

CHRISTIAN, Chief Judge

Defendant Drakes Publishers, Inc. d/b/a High Society Magazine[1] ("High Society") has moved the Court for

[1] The instant motion was filed on behalf of High Society Magazine. Drakes Publishers, Inc. has been substituted as defendant in this cause. Accordingly, we will treat the motion as one filed on behalf of Drakes Publishers.

judgment notwithstanding the verdict or, in the alternative to amend the findings of facts entered in this cause on March 2, 1987.[2] Defendant contends that the relief requested is warranted because the court mistakenly based its finding that agents of High Society Magazine knew about the existence of the real Carousel upon our disbelief of the testimony given by both Ira Kirschenbaum, vice president of High Society, and Gloria Leonard the publisher of the magazine. Accordingly, defendant argues that our finding that defendant acted with actual malice is not supported by substantial evidence found in the record. For the reasons which follow, the motion will be denied.

(1) It is well settled that "when the testimony of a witness is not believed, the trier of fact may disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumer Union of United States, Inc., 104 S Ct. 1949, 1966 (1984). See also, Nishikawa v. Dulles, 356 US 129, 136-37 (1958); Moore v. Chesapeake & Ohio R. Co., 340 US 537, 537 (1951). Our finding that agents of High Society knew of the existence of the Carousel located in St. Thomas, however, was not based upon the discredited testimony of defendant's witnesses.

As we stated in our Memorandum Opinion entered on March 2, 1987, Leonard resided in Puerto Rico during

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[2] This cause was tried to the Court, and not before a jury. A motion for judgment notwithstanding the verdict is, therefore, inappropriate. Consequently, we will treat defendant's motion as one to amend the findings of fact entered in this matter by the Court on March 2, 1987.

the 1960's, at which time she made frequent visits to this island. The Carousel was then at its peak of popularity. Leonard testified that she had occasion to walk along the waterfront several times. At trial, she was able to recall the businesses located on either side of the Carousel. After her return to the mainland, Leonard visited St. Thomas six or seven times. Kirschenbaum also testified that he had visited St. Thomas.

(2) It was an established policy that all writers who submitted articles or stories for publication in High Society were required to sign a purchase order. The purchase order contained a disclaimer which provided that the publication would not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity. Leonard accepted the story about the Carousel despite the author's failure to sign the necessary disclaimer.

(3) The Court, as the trier of fact, was permitted to find an ultimate fact to be true upon proof of other facts, if upon consideration of all circumstances revealed by the evidence, the Court was satisfied that in logic and common experience, the ultimate fact was more likely than not to follow from the fact was more likely than not to follow from the fact proven. McInerney v. Berman, 473 F. Supp. 187, 188 (D. Mass. 1979), aff'd 621 F.2d. 1162 (10th Cir. 1977), citing The Wenona, 86 US 41, 58 (1873).

The inferences which can be drawn from the evidence outlined above clearly supports the finding entered by the Court in this cause.

ORDER

The premises considered, therefore, and the Court being fully advised,

IT IS ORDERED that the motion of defendant Drakes Publishing Inc. d/b/a High Society Magazine to amend the findings of fact entered in this cause on March 2, 1987 be, and the same is, hereby DENIED.

DATED: July 2, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE
Defendant.

JUDGMENT

This action having come for trial before the Court, The Honorable Almeric L. Christian, Chief Judge presiding, and the issues having been duly tried and a decision having been rendered, it is

ORDERED and ADJUDGED that Plaintiff S & H Management Corp. recover from defendant Drakes Publishers, Inc. d/b/a High Society Magazine the sum of seventy-five Thousand ($75,000.00) Dollars with interest from the date of Judgment.

FURTHER ORDERED and ADJUDGED that plaintiff Jaber Samad take nothing and that the action be DISMISSED as to the said plaintiff on the merits.

DATED: July 24th, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE AND RUSSELL SMITH

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
DRAKES PUBLISHERS, INC. d/b/a/
HIGH SOCIETY MAGAZINE,
Appellant

On Appeal from the United States District Court
of the Virgin Islands (St. Thomas)
(D.C. Civil No. 82-0026)
District Judge: Almeric L. Christian

Argued April 19, 1988

Before: SEITZ, SLOVITER and BECKER,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Each party to bear its own costs.

Attest:
/s/ Sally Mrvos
Clerk

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: Apr. 29, 1988

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH
Appellee

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.
Appellee

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
DRAKES PUBLISHERS, INC.,
d/b/a/ HIGH SOCIETY MAGAZINE,
Appellant

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAN, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Drakes Publishers, Inc., d/b/a High Society Magazine, Appellant in No. 87-3583, and Appellee in No. 87-8582, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

DATED: May 31, 1988

APPENDIX G

VIRGIN ISLANDS CODE, TITLE 1, SECTION 4

4. APPLICATION OF COMMON LAW; RESTATEMENTS

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws in the country.

APPENDIX H

RESTATEMENT OF TORTS 2d

ELEMENTS OF A CAUSE OF ACTION FOR DEFAMATION

558. ELEMENTS STATED

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication

559. DEFAMATORY COMMUNICATION DEFINED

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

561. DEFAMATION OF CORPORATION

One who publishes defamatory matter concerning a corporation is subject to liability to it

(a) if the corporation is one for profit and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it, or

(b) if, although nor for profit, it depends upon financial support from the public, and the matter tends to

interfere with its activities by prejudicing it in public estimation.

Comment on Clause (a):

b. A corporation for profit has a business reputation and may therefore be defamed in this respect. Thus a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it. (See 569, Comment e)

564. APPLICABILITY OF DEFAMATORY COMMUNICATION TO PLAINTIFF

A defamatory communication is made concerning the person to whom its recipient correctly or mistakenly but reasonably, understands that it was intended to refer.

Comment:

a. Person intended. It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff. If it is in fact intended to refer to him, it is enough that it is so understood even though he is so inaccurately described that is extraordinary that the communication is correctly understood. If however, the recipient does not understand that the plaintiff is intended by it, the fact that the defamer intended to refer to him is immaterial.

b. Person mistakenly but reasonably believed to be intended. If the communication is reasonably understood by the person to whom it is made as intended to refer to the plaintiff, it is not decisive that the defamer did not intend to refer to him. (But see Comment f). It is

not enough however, that the defamatory matter is actually understood as intended to refer to the plaintiff; the interpretation must be reasonable in the light of all the circumstances. It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended. Extrinsic facts may make it clear that a statement refers to a particular individual although the language used appears to defame nobody. (See Comments c, d and f). It is not necessary that everyone recognize the other as the person intended; it is enough that any recipient of the communication reasonably so understands it. However, the fact that only one person believe that the plaintiff was referred to is an important factor in determining the reasonableness of his belief. If the applicability of the defamatory matter to the plaintiff depends upon extrinsic circumstances, it must appear that some person who saw or read it was familiar with circumstances and reasonably believed that it referred to the plaintiff. As to the use of the inducement, colloquium and innuendo, in making the averments, see 563, Comment f.

c. Fictitious Character. A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters

as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person, it is not decisive that the author or playwright did not so intend. (See Comment f). The fact that the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand otherwise. Such a statement, however; is a factor to be considered by the jury in determining whether readers did so understand it, or if so, whether the understanding was reasonable.

Illustration:

1. The A motion picture producing company produces a film based upon historical events but offered as a fictitious play. In the film, B, a young woman who was a participant in some of these events, is represented as having yielded to the hypnotic power of the villain. In spite of the deviations of the film from the exact historical facts, B's friends reasonably understand that she is portrayed in the picture. The film is defamatory of B.

569. LIABILITY WITHOUT PROOF OF SPECIAL HARM----LIBEL

One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication.

Libelous imputation of immorality. It is actionable per se to accuse in libelous form either a man or woman of any sexual misconduct irrespective of whether the misconduct constitutes a criminal offense or whether it harms

the other in his business, trade or profession. *Thus it is actionable per se to accuse by a libelous publication either a man or woman of adultery or fornication* or to accuse another of keeping a house of ill fame or frequenting such a house. Any abnormal sex conduct or tendency comes within the rule stated in this Section whether or not it constitutes a crime. So too, it is libelous to charge another with insulting proposals to members of the opposite sex, or any kind or lascivious or grossly immodest conduct.

Illustration:

1. The A newspaper publishes a statement that B, "whose ostensible occupation is trimming hats, is the mistress of C." A is subject to liability to both B and C.

Libelous accusations of untruthfulness or dishonesty. It is actionable per se to impute to another in libelous form conduct that tends to lower the other's reputation for veracity or honesty, irrespective or whether the conduct constitutes a criminal offense and irrespective of whether it tends to affect the trade, business or profession of the other. Thus it is actionable so to accuse another of the crime of perjury, larceny or embezzlement, or to make any derogatory imputation of fact concerning another's veracity or integrity. Statements that another has cheated or taken unfair advantage in a business transaction or that he has in any way defrauded others, as by refusing to pay his debts, are within the rule stated in this Section.

570. LIABILITY WITHOUT PROOF OF SPECIAL HARM----SLANDER

One who publishes matter defamatory to another in such a manner as to make the publication a slander is

subject to liability to the other although no special harm results if the publication imputes to the other

(a) a criminal offense, as stated in 571, or

(b) a loathsome disease, as stated in 572, or

(c) matter incompatible with his business, trade, profession, or office as stated in 573, or

(d) serious sexual misconduct, as stated in 574.

571. SLANDEROUS IMPUTATIONS OF CRIMINAL CONDUCT

One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be

(a) punishable by imprisonment in a state or federal institution, or

(b) regarded by public opinion as involving moral turpitude.

573. SLANDEROUS IMPUTATIONS AFFECTING BUSINESS, TRADE, PROFESSION OR OFFICE

One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm.

574. ALL SLANDEROUS IMPUTATIONS OF SEXUAL MISCONDUCT

One who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm.

580 B. DEFAMATION OF PRIVATE PERSON

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affect his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and it defames the other

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

Comment. h. **Factors in applying the negligence standard**. In determining whether the defendant acted as a reasonable, prudent person under the circumstances in publishing the defamatory communication on the basis of his check or lack of check as to its accuracy and as to its defamatory character, there are factors to be taken into consideration; the thoroughness of the check that a reasonable person would make before he published the statement may vary with the play of these factors. The standard of care does not change, but its application may vary with the circumstances. One factor is the time element. Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate? In the latter situation, due care may require a

more thorough investigation. A second factor is the nature of the interests that the defendant was seeking to promote by publishing the communication. Informing the public as to a matter of public concern is an important interest in a democracy; spreading of mere gossip is of less importance. How necessary was this communication to these recipients in order to protect the interest involved? If there was no substantial interst to protect in publishing the communication to these recipients, then a reasonable person would be hesitant to publish the communication unless he had good reason to believe that it was accurate.

A third factor is the extent of the damage of the plaintiff's reputation or the injury to his sensibilities that would be produced if the communication proves to be false. Was the communication defamatory on its face? Would its defamatory connotation be known only to a few? How extensive was the dissemination? How easily might the plaintiff protect his reputation by means at his own disposal?

There has been no indication that proof of fault in the ordinary defamation case must meet the unusual stand of "clear and convincing proof" that the Supreme Court has held to be required in showing knowledge or reckless disregard as to falsity in an action by a public official or a public figure. (See 580A, Comment f). It seems doubtful that this requirement will be imposed in the application of the rule set forth in this Section.

APPENDIX I

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26

JABER A. SAMAD AND S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE AND RUSSELL SMITH,
Defendants.

DEFENDANT'S FIFTH SET OF
INTERROGATORIES, REQUESTS FOR ADMISSIONS
AND DEMAND FOR PRODUCTION
OR DOCUMENTS

TO: Jaber A. Samad and
S & H Management Corp.
c/o Ethel Mithcell, Esq.
25 A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands

Pursuant to Rule 33, 34 and 36 of the Federal Rules of Civil Procedure, the following Interrogatories, Requests for Admissions and Demand for Production of Documents are propounded by Defendant High Society in the above-captioed action to the Plaintiffs and are to be answered under oath within the time provided by said Rules.

25A. Do you ADMIT THAT the Carousel is easily visible, and that one could not help to notice it walking down the waterfront.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26
JABER A. SAMAD and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH
Defendants.

ORDER

THIS MATTER came before the Court on Motion of Defendant High Society to deem admitted those demands for admissions contained in its Fifth Set of Interrogatories, Demand for Admissions and Demand for the Production of Documents (Fifth Set). The Defendant's Fifth Set having been served on Plaintiff's counsel on or about May 13, 1985 and the Plaintiffs having failed, neglected and refused to answer or otherwise respond to said demands for admissions, and this Court having orally entered an Order on June 24, 1985 in open court deeming said requests to admit as contained in Defendant's Fifth Set as being admitted, and the premises considered it is hereby ORDERED that the demands for admissions contained in Defendant's Fifth Set be and hereby are deemed admitted pursuant to F.R.Civ.P. 36 for purposes of this lawsuit.

DATED: August 6, 1985 /s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:
GEOFFREY W. BARNARD
Clerk of the Court
by /s/ Frank Blackman

APPENDIX J

TRIAL TESTIMONY OF GLORIA LEONARD
VOLUME I 330 OF THE TRIAL TRANSCRIPT

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in fiction?

A. I believe you can.

Q. And as a professional, when would that occur?

A. Again ----

MR. ARELLANO: Your Honor, that question is vague.

THE COURT: It isn't that it is vague, but you see now, Mrs. Mitchell, you have gotten this witness to answer a question in a way that is directly contrary to Mr. Arellan's opening statement as a lawyer.

MRS. MITCHELL: I know.

THE COURT: What do you expect me to do accept her word on this matter?

MRS. MITCHELL: No. She is the publisher and I think it is from her that the policy of her magazine and the policy of the industry should be learned.

THE COURT: The policy of the magazine is certainly within her competence. The policy of the industry is within her competence. But the legal aspect is not.

MRS. MITCHELL: I am not asking for the legal aspect. I was asking her to define for me what ---

THE COURT: You asked the witness a moment ago something to the effect of whether it was possible to libel

somebody in piece of fiction and the witness answered, yes.

MRS. MITCHELL: Yes.

THE COURT: All right, Mr. Arellano in his opening statement said, did he not, that specifically because this is purely fiction it can't be libel?

MRS. MITCHELL: And your Honor, I am trying to show that the publisher knew that it could be possible to libel someone in fiction.

THE COURT: All right, very well. She has answered your question.

And Trial Transcript Volume II page 287

Q. Now Miss Leonard, when I deposed you back in February, on page 32 I asked you this question: "In you professional opinion, if you had known that there was a place called the Carousel Bar, would you have published the article?"

And your answer was, "No, more than likely no, or we would have changed the name."

Do you still hold to that opinion

A. No, we do not.

Q. What is your opinion now; you would have published it anyway?

A. My opinion is, after all the events that have transpired – and I am a voracious reader in my own right and am partial to reading fiction. And every time I read fiction, inevitable there is a mention of a real place or a real person. So that, no, I would still have published it had I known there was a Carousel.

See also page 310 of Volume I of Trial Transcript

MS. MITCHELL: Yes, sir.

BY MS. MITCHELL:

Q. Now Miss Leonard, you told me you had lived in Puerto Rico at one time; is that correct?

A. That's correct.

Q. When was that, approximately?

A. Approximately from 1968 to 1970.

Q. And when you were living in Puerto Rico, did you have occasion to come to St. Thomas?

A. On a number of occasions, yes.

Q. And when you came to St. Thomas, did you go on the waterfront?

A. Yes.

Q. And would you say each time you came, you generally went on the waterfront?

A. I think it's practically an impossible task to come to St. Thomas and avoid the waterfront.

THE COURT: So, you would say that each time –

THE WITNESS: Yes.

THE COURT: All right.

APPENDIX K

DEPOSITION OF IRA KIRSCHEMBAUM, VICE-PRESIDENT OF PETITIONER

Q. Was there any procedure for rejecting an article if it appeared to depict a real person or place?

A. As I generally said, we try to publish only fiction, since we are a non-controversial magazine, and if we felt anything was real, it would be rejected immediately. (Deposition page 33)

Q. In your professional opinion if you knew that his article referred to a specific business, would you have required and investigation?

A. Yes.

Q. Have you ever refused to publish an article that referred to a particular person?

A. Yes. (Deposition page 38)

Q. What exactly were you told or what information were you given with regard to libel?

A. Never to depict real people or real places in stories, unless they are meant to be that way.

Q. How many persons in your organization were told of this?

A. Everybody who worked on the magazine. (Deposition page 41)

A. Still the same guidelines. Try to make sure everything is fictional, but we do not have an investigative team to go out into the field and research every story that comes in.

Q. When a story comes in, do you find out if there is such a place? You name St. Thomas.

A. Right.

Q. Do you find out if there is such a business in St. Thomas before you publish?

A. We try to. (Deposition page 45)

Q. Did you have any discussions with Ms. Leonard as to procedures for investigating your stories?

A. Ms. Leonard does not have a general working knowledge of what should be checked out before a story is published in High Society Magazine.

Q. Did you give her that knowledge?

A. We gave it to her, plus we have discussed it many times in our organization, although there are no formal written Guidelines.

Q. What exactly was discussed?

A. That anything that is published should be checked out as carefully as possible and that if it is actual, that releases be obtained and if it is fictional, make best efforts. (Deposition pages 72-73)

Q. Have you ever been to St. Thomas?

A. I believe I have.

Q. Have you ever been on the waterfront on St. Thomas?

A. Yes. (Deposition page 27)

APPENDIX L

HARVEY SHAPIRO DEPOSITION, EXPERT WITNESS FOR PETITIONER AS TO INDUSTRY STANDARDS

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in a fiction?

A. I believe you can. (lines 14-17)

Q. And as a professional, when would that occur?

A. Again ----

Q. Would you knowingly include the name of a business, an existing business, in one of your stories in a manner that would be derogatory or defamatory?

A. No.

Q. Would you include the name of a person who lives in a place if you knew that story is supposed to be about that person or seems to identify that person?

A. No . . . (next question omitted)

Q. Do you think that the identification of a private person in an erotic fiction story would constitute defamation if it were not true?

A. Yes, I guess so.

Q. Would you feel responsible if you defamed a real person?

A. Yes.

(Deposition pages, 16 and 22)